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Sup. Ct.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 194..6

MAY DEPARTMENT STORES COMPANY,
Doing Business as FAMOUS-BARR
COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 262

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MILTON H. TUCKER,
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Cases Cited.

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MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
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NATIONAL LABOR RELATIONS BOARD.
No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Frederick M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

THE PROCEEDINGS.

This case was commenced by the National Labor Relations Board (hereinafter called "Board") which filed in

the United States Circuit Court of Appeals, Eighth Circuit, pursuant to Section 10 (e) of the National Labor Relations Act, 29 USC Section 160 (e) (hereinafter called the Act), its petition for enforcement of an order entered by the Board on December 14, 1944 (Tr. R. 149)* against Petitioner at its department store in St. Louis, Missouri. In its Decision and Order the Board found that the Petitioner had violated Sections 8 (1) and (3) of the Act and ordered Petitioner to cease and desist from the alleged conduct and from all other unfair labor practices under the Act, to offer reinstatement, with back pay, to certain former employees, to offer employment as a salesperson to a former demonstrator, to rescind immediately its rule against solicitation in so far as it prohibits union solicitation off the selling floor during nonworking hours, and to post notices showing its compliance with the Order.

The Petitioner filed its Answer (Tr. R. 301) to the Board's petition and alleged that the Order is invalid and should be set aside because of lack of substantial evidence to support the findings of fact upon which the order was issued and because of the absence of facts to support the conclusions upon which the order was issued; and because the order exceeds the power and jurisdiction of the Board.

The United States Circuit Court of Appeals, Eighth Circuit, filed its opinion on April 11, 1946, enforcing the Board's order with the addition of the words, "where such acts are done for the purpose of discouraging membership in a labor organization" at the end of paragraph 1 (a) of the cease-and-desist provisions (Tr. VIII, 18).

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* In accordance with paragraph 7 of Rule 38 of this Court the record as printed below together with the proceedings and opinion in that court have been filed here. The record consists of a volume entitled "Record" and eight additional volumes bearing Roman numerals I to VIII, respectively. References to the volume entitled "Record" are designated herein as "R. ..." with the appropriate page number. References to the other volumes are designated by the volume number in Roman numerals and the appropriate page number. Board's exhibits are designated as "BX. ..." with the appropriate number, and exhibits identified by the Petitioner, respondent below, are designated as "RX. ...". All typographical emphasis herein has been supplied by counsel, unless otherwise indicated.

The Petitioner filed its Petition for Rehearing on April 26, 1946 (Tr. VIII, 44) and thereafter on May 20, 1946, the said Circuit Court of Appeals entered an order denying said petition for rehearing (Tr. VIII, 45). And on May 23, 1946, said Circuit Court of Appeals entered its decree enforcing the said order of the Board with the modification mentioned above (Tr. VIII, 45).

THE CASE BEFORE THE BOARD.

The proceeding was instituted before the Board by the filing of a consolidated complaint on August 19, 1942, based on charges filed by the C. I. O. and by the A. F. L. (Tr. R. 19). On September 14, 1942, a settlement stipulation was entered into which was approved by the Board (Tr. VII, 4777, 4784).

Thereafter, on February 17, 1943, the Board issued an amended complaint (Tr. R. 9) and alleged that the Petitioner had violated Section 8 (1) of the Act in various ways, including the promulgation of its rule against solicitation, and had discharged 13 employees in violation of Section 8 (3) of the Act. A hearing was held on the amended complaint at which seventy-six witnesses testified, several of them on more than one occasion.

The Trial Examiner's intermediate report was filed on October 6, 1943, and made recommendations sustaining the complaint in substantially all respects but dismissed the complaint as to one former employee (Tr. R. 171-292). Petitioner filed detailed exceptions to the intermediate report (Tr. R. 39-146).

The order of the Board, as stated above, sustained the complaint, except to dismiss it as to one additional employee, and the Petitioner's rule against solicitation was ordered rescinded only insofar as it prohibits union solicitation off the selling floor during nonworking hours.

II.

JURISDICTION.

The basis upon which it is contended that this Court has jurisdiction to review the decision and decree in question is as follows:

Section 240 of the Judicial Code, as amended, 28 U. S. C., Section 347, provides that in any case in a Circuit Court of Appeals it shall be competent for this Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to this Court for determination here with the same power and authority, and with like effect, as if the cause had been brought here by an unrestricted writ of error or appeal.

Section 10 (e) of the National Labor Relations Act, 29 U. S. C., Section 160 (e), provides that the Board shall have power to petition any Circuit Court of Appeals within any circuit wherein the respondent transacts business for the enforcement of its orders entered as provided in Section 10 of said Act and that jurisdiction of the Circuit Court of Appeals shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by this Court upon writ of certiorari or certification.

The decree of the United States Circuit Court of Appeals, Eighth Circuit, sought to be reviewed here, was entered on the 23rd day of May, 1946 (Tr. VIII, 45).

III.

THE QUESTIONS PRESENTED.

(1) Whether or not the Court below was **required to hold**, as it said (Tr. VIII, 6, 7,), that the Board was warranted in declaring that the rule against solicitation is invalid, and violative of the Act, in so far as it prohibits union solicitation off the selling floor during nonworking hours, where the undisputed evidence showed that the rule

against solicitation in Petitioner's department store for any purpose, except Petitioner's business, has been in force for many years, and the same rule has been in force for many years in the two other department stores in St. Louis and in other department stores in other cities, and the rule has been recognized by both the C. I. O. and the A. F. L. in contracts with department stores, and where the Board itself in this case held that the presumption against a rule prohibiting solicitation on the employees' own time had been overcome by the evidence here and the Board sustained the rule in so far as it applied to the selling floor? And, in the same connection, whether or not the Court below, by enforcing the Board's order and defining the terms used by the Board, may promulgate an operating rule for the Petitioner's store which is arbitrary and unworkable and which applies only to parts of the store where sales of "**commodities**" are made and ignores parts of the store where sales of **services** are made, and which confuses the nonworking hours of some employees with the working hours of other employees?

(2) Whether or not the power of the Board to draw inferences permits the Board, and requires the reviewing court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence?

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The Circuit Court of Appeals, Eighth Circuit, has decided an important question of federal law which has not been, but should be, settled by this Court, in that the Court below has decided that it was **required to hold** that, although the Board itself in this case found the presumption against the validity of a rule prohibiting solicitation on employees' own time had been overcome by the undis-

puted evidence in this case, nevertheless the Board was warranted in modifying the rule which has been in force in Petitioner's retail department store for many years according to the undisputed evidence, and which has also been in force in the two other department stores in St. Louis and in other department stores in other cities for many years, and has been recognized by both the C. I. O. and the A. F. L. in contracts with department stores, and is contained in the contracts between this very union and department stores in other cities.

The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals, Sixth Circuit, in the case of **Midland Steel Products Co. v. N. L. R. B.**, 113 F. 2d 800, 805, on the question of whether the reasonableness of an employer's rule against solicitation is a question of law for the Court, in that the Circuit Court of Appeals for the Sixth Circuit in that case held that it was a question of law for the Court, whereas the Circuit Court of Appeals for the Eighth Circuit in this case considered the decision of the Board on this question of law to be as conclusive as on a question of fact, and said that it was **required to hold** that the Board was warranted in modifying Petitioner's rule.

And the Circuit Court of Appeals, Eighth Circuit, has decided an important question of federal law which has not been, but should be, settled by this Court in that the Court below, by defining terms in the Board's order, has joined with the Board in promulgating an operating rule for the Petitioner's store which is arbitrary and unworkable and which applies only to parts of the store where sales of "**commodities**" are made and ignores parts of the store where sales of **services** are made, and which confuses the nonworking hours of some employees with the working hours of other employees.

(2) The implied holding of the Court below that the Board's inference-drawing power permits the Board, and

requires the reviewing court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence and that such findings, instead, may be unsupported by any evidence, or based upon uncorroborated and controverted hearsay and circumstantial evidence alone, constitutes a misapplication of the principles governing the Board's fact-finding and inference drawing power and the scope of judicial review enunciated by this Court in **Consolidated Edison Company of New York, Inc., v. National Labor Relations Board,** 305 U. S. 197; **National Labor Relations Board v. Columbian Enameling and Stamping Co., Inc.,** 306 U. S. 292; and **National Labor Relations Board v. Nevada Consolidated Copper Corporation,** 316 U. S. 105.

This holding of the Court below is in conflict with numerous decisions of other Circuit Courts of Appeals* in that the other Circuit Courts of Appeals have held in the cited cases that inferences drawn by the Board must be

* National Labor Relations Board v. Sheboygan Chair Co., 125 F. (2d) 436, 439 (C. C. A. 7);
Magnolia Petroleum Company v. National Labor Relations Board, 112 F. (2d) 545, 547-9 (C. C. A. 5);
Magnolia Petroleum Corporation v. National Labor Relations Board, 115 F. (2d) 1007, 1011-12 (C. C. A. 10);
Owens-Illinois Glass Co. v. National Labor Relations Board, 123 F. (2d) 670 (C. C. A. 6);
Stonewall Cotton Mills, Inc., v. National Labor Relations Board, 129 F. (2d) 629, 631 (C. C. A. 5);
National Labor Relations Board v. Service Wood Heel Co., Inc., 124 F. (2d) 470, 472-3 (C. C. A. 1);
Quaker State Oil Refining Corp. v. National Labor Relations Board, 119 F. (2d) 631, 632 (C. C. A. 3);
National Labor Relations Board v. Moltrup Steel Products Co., 121 F. (2d) 612, 614 (C. C. A. 3);
National Labor Relations Board v. Blue Bell-Globe Mfg. Co., 120 F. (2d) 974, 975-6 (C. C. A. 4);
National Labor Relations Board v. Sparks-Withington Co., 119 F. (2d) 78, 80 (C. C. A. 6);
Foote Bros. Gear & Machine Corp. v. National Labor Relations Board, 121 F. (2d) 802, 803-4 (C. C. A. 7);
Martel Mills Corp. v. National Labor Relations Board, 114 F. (2d) 624, 627-8 (C. C. A. 4);
National Labor Relations Board v. Ford Motor Co., 114 F. (2d) 905, 915 (C. C. A. 6);
Continental Oil Co. v. National Labor Relations Board, 113 F. (2d) 473, 481 (C. C. A. 10);
National Labor Relations Board v. Boss Manufacturing Co., 107 F. (2d) 574, 578-9 (C. C. A. 7).

fairly, reasonably, and **legitimately** drawn from primary facts established by substantial evidence which does more than create a suspicion or surmise and that it is the duty of the reviewing court to determine whether or not the Board's inferences are so supported by substantial evidence.

The decision of the Court below thus raises a question of grave public importance in the orderly administration of the mandate of Section 10 (e) and (f) of the Act, and the application of the principles enunciated by this Court for the effectuation of that mandate, which has not been, but should be, decided by this Court.

Wherefore, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket as No. 15094, National Labor Relations Board, Petitioner, v. May Department Stores Company, a corporation, doing business as Famous-Barr Company, Respondent, to the end that this case may be reviewed and determined by this Court, as provided by the statutes of the United States, that the decision and decree of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: July 1, 1946.

Respectfully submitted,

THE MAY DEPARTMENT STORES COMPANY,
By MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 194..

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears at Tr. VIII, 2-18. The opinion is reported in 154 F. 2d 533.

II.

JURISDICTION.

The Court's jurisdiction is invoked pursuant to the provisions of Sec. 240 of the Judicial Code, as amended, 28 U. S. C., Sec. 347, and Sec. 10 (e) of the National Labor

Relations Act, 29 U. S. C., Sec. 160 (e). The date of the decree entered by the Court below is May 23, 1946, Tr. VIII, 45.

III.

STATEMENT OF THE CASE.

A statement of the case appears in the foregoing petition; which statement is hereby adopted and by reference made a part of this brief as a statement of the case.

IV.

SPECIFICATION OF ERRORS.

(1) The Court erred in enforcing the Board's order, with only the modification ordered by the Court, and erred in enforcing each and every provision contained in said order.

(2) The Court erred in holding that it was required to hold that the Board was warranted in ordering Petitioner to rescind its rule against solicitation in so far as it prohibits union solicitation off the selling floor during non-working hours, and in promulgating, by definition of the Board's terms, an arbitrary and unworkable rule against solicitation in Petitioner's store.

(3) The Court erred in holding, in effect, that the Board's inference-drawing power permits the Board, and requires the reviewing Court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence.

(4) The Court erred in holding that there is sufficient evidence to support each of the Board's material findings and in failing to hold that each and every fact finding of the Board is unsupported by any evidence, or is based solely upon uncorroborated and controverted hearsay and

circumstantial evidence and that, therefore, none of the Board's fact findings are entitled to finality.

(5) The Court erred in holding that Petitioner's conduct should be considered in its "setting of totality," but that Petitioner may not "focus separately upon each of the incidents" in order to demonstrate that Petitioner's conduct, even in its "setting of totality," was not violative of the Act.

(6) The Court erred in failing to set aside the Board's order in its entirety.

V.

SUMMARY OF ARGUMENT.

A. **Validity of the Rule Against Solicitation Is a Question of Law:** The Court below erroneously held that it could not determine, as a matter of law, whether or not Petitioner's rule against solicitation in the Petitioner's department store is lawful, but considered erroneously the decision of the Board to be as conclusive on this question of law as on a question of fact, and enforced the Board's arbitrary, unworkable and erroneous order.

B. **Limitation on Inference-drawing and Fact-finding Power of the Board:** The Court below accepted as conclusive the Board's inferences which are unsupported by any evidence, or are based solely upon uncorroborated and controverted hearsay or circumstantial evidence, thereby holding, in effect, that the inference-drawing power of the Board permits the Board, and requires the reviewing Court, to dispense with the statutory requirement that the Board's findings must be supported by substantial evidence. The Board's power to draw inferences is not a substitute for the requirement that the Board's findings of fact be supported by substantial evidence. The number and the nature of the errors in the Board's

findings of fact deprive the Board's inferences of any evidentiary support whatever. Inferences based upon such erroneous findings and upon uncorroborated hearsay and circumstantial evidence cannot prevail in the face of direct substantial evidence to the contrary.

The holding of the Court below that the Board's findings, unsupported by any evidence, or based solely upon uncorroborated hearsay or circumstantial evidence, are conclusive upon the reviewing Court is in conflict with the decisions of this Court and with many decisions of other Circuit Courts of Appeals which hold that findings of fact and inferences drawn by the Board must be supported by substantial evidence and may not be grounded solely upon uncorroborated hearsay evidence, and that inferences are binding upon the reviewing Court only when they are reasonably, legally and legitimately drawn from facts established by substantial evidence, and that factual conclusions which rest upon inferences cannot prevail in the face of direct contradictory evidence.

VI.

ARGUMENT.

A.

VALIDITY OF THE RULE AGAINST SOLICITATION IS A QUESTION OF LAW.

The Court below erroneously held that it could not determine, as a matter of law, whether or not Petitioner's rule against solicitation in the Petitioner's department store is lawful, but considered erroneously the decision of the Board to be as conclusive on this question of law as on a question of fact, and enforced the Board's arbitrary, unworkable and erroneous order.

The Board's order is that the Petitioner:

> "(a) Rescind immediately its rule against solicitation insofar as it prohibits union solicitation **off the selling floor during nonworking hours**, and immediately post notices of such rescission in conspicuous places throughout its department store and three warehouses in St. Louis, Missouri;" (Tr. R. 168).

This order is based upon the following language contained in the Board's decision:

> "2. The respondent's no-solicitation rule prohibits solicitation for any organization on the respondent's premises at any time. The Trial Examiner found that this rule constitutes an unreasonable impediment to self-organization, in violation of Section 8 (1) of the Act, insofar as it prohibits union solicitation on the respondent's premises by employees outside of their working hours.
>
> "We have in many prior decisions made clear our position that working time is for work, and that the Act does not prevent an employer from promulgating and enforcing reasonable rules governing the conduct of

employees during working hours. We have made it equally clear, however, that, **in the absence of special circumstances**, a prohibition against union solicitation on the employer's premises outside of working time, such as 'before and after work and during the luncheon and rest periods,' does not bear reasonable relation to the **efficient** operation of the employer's business, and therefore constitutes an unwarranted interference with the employees' rights under the Act. The respondent urges that, while the foregoing principles may be sound as applied to industrial plants, they should not be invoked in cases involving retail department stores because of the unique manner in which the latter type of enterprise conducts its operations. We perceive no reasonable basis for distinguishing between the two types of enterprises so far as concerns a general prohibition against union solicitation by employees during nonworking hours at all places on the respondent's premises. The respondent has adduced no convincing evidence that such a blanket injunction bears reasonable relation to the efficient operation of its business. **However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the solicitation, if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business.** We therefore find that the respondent's rule is invalid and violative of the Act, only insofar as it prohibits union solicitation off the selling floor during nonworking hours (such as luncheon and rest periods)." (Tr. R. 154-155.)

Petitioner urged below that as a matter of law its rule does not constitute an unreasonable impediment to self-organization in violation of Section 8 (1) of the Act under the undisputed facts and circumstances shown by the record in this case. The Board conceded that the rule

is not necessarily unlawful, but said that its validity depends on "special circumstances" which would make the rule bear "reasonable relation to the **efficient** operation" of Petitioner's business. The Board's error is that the concept of "**efficient** operation" which is a factor that is susceptible of measurement in an industrial plant, where the Board's test was developed, does not apply in a retail department store where contact with the buying public is an important factor and where the store's business is continuous so that many employees are always working while others are not—a fact which the Board itself admitted by agreeing that it is reasonable to prohibit all solicitation at **any time on the selling floor.**

All cases cited by the Board in support of the proposition that Respondent's rule constitutes an unreasonable impediment to self-organization are merely to the effect that **in an industrial plant**, a rule which prohibits an employee from soliciting for union membership on the employer's premises on the employee's own time, is presumptively discriminatory, in the absence of a showing of special circumstances making it necessary to restrict union solicitation on company property outside of working hours. In view of the Board's own conclusion that further restrictions are proper in a department store, as in this case, the Board's rule of presumption for industrial plants is irrelevant.

Petitioner's rule, according to the undisputed evidence, has been in force for many years (Tr. I, 116, 257; V, 3526, 3700, 3786, 3860, 3887, 3906, 3925; VI, 4176). It is obvious that Petitioner considered a rule prohibiting all types of solicitation, except Petitioner's business, on the store premises as a sound operating rule. The fact that Petitioner's rule (BX. 29; Tr. VII, 4790) was and is a sound operating rule is corroborated by the undisputed testimony that the same rule is in force, and has long been in force, in the

two other department stores in St. Louis (Tr. VI, 4235, 4285) and in department stores in other cities (Macy's, N. Y., Tr. V, 3975; Kaufman's, Tr. VI, 4139; and Gimbel's, Tr. VI, 4133, in Pittsburgh, and Davis, Tr. VI, 4177, and Mandel's, Tr. VI, 4180, Chicago). **In fact, there was no evidence** of a single department store which has a different rule, notwithstanding the claims of this Union that it represents the employees of many department stores throughout the country (BX. 198, Tr. V, 3308).

Since the rule was adopted in Petitioner's department store for sound operating reasons, and is customary in department stores and has been recognized as proper in contracts with department stores made by this same Union, as well as by the A. F. L., we contend that **as a matter of law** the rule **is** reasonable and may not be limited by the Board, even though the result of the enforcement of the rule may be somewhat to limit union solicitation and incidentally to impede self-organization. There are many proper working rules that may incidentally limit union organizational activities on the employee's own time, but as long as union solicitation is not singled out and as long as such interference was not the purpose of the adoption of the rule, we submit that the employer's judgment of the necessity and extent of a rule arrived at in good faith, without ulterior purpose, must be given great weight.

This question of law was presented squarely to the Court below, but the Court refused to consider or pass upon it, saying only that the question had been decided by the Board and that this Court had sustained the Board's right finally and conclusively to decide the question. The Court below in its opinion said (Tr. VIII, 5-6):

> "In dealing with the various situations arising under the Act, the Board manifestly is entitled to estab-

lish general guides and principles, subject only to the limitation of appropriateness to effectuate the Act's purposes and of reasonableness in relation to all the rights involved. Cf. Wallace Corporation v. National Labor Relations Board, 323 U. S. 248, 253-255, 65 S. Ct. 238, 241, 89 L. Ed. ... **The Board has established such guides and principles in dealing with no-solicitation rules, and their appropriateness and reasonableness have been recognized by the Supreme Court in Republic Aviation Corporation v. National Labor Relations Board,** 324 U. S. 793, 801-803, 65 S. Ct. 982, 987-988, 89 L. Ed. ..."

All this Court held in the Republic Aviation case was that the Board could establish **presumptions** and **"the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation."** The Republic case involved a manufacturing plant. Before there was any union activity at its plant, the Republic Aviation Corporation adopted the following rule:

> "Soliciting of any type cannot be permitted in the factory or offices."

Thereafter, an employee who, after being warned of this rule, persisted in passing out union membership application cards to employees **during lunch periods,** was discharged.* The Board held that the no-solicitation rule violated Section 8 (1), and that the Company had discriminated against the discharged employee under Section 8 (3).

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* In the present case not one of the seven solicitation cases is claimed to have involved an incident that took place during the lunch period of both parties (RX. 30, Tr. VII, 4857; RX. 31, Tr. VII, 4858; RX. 32, Tr. VII, 4858-9; RX. 33, Tr. VII, 4860; RX. 34, Tr. VII, 4860; RX. 35, Tr. VII, 4861; RX. 36, Tr. VII, 4862; RX. 37, Tr. VII, 4863; RX. 38, Tr. VII, 4864; RX. 39, Tr. VII, 4864; RX. 40, Tr. VII, 4866; and Tr. VII, 4700). And the only cases which took place off the selling floor were the Athanas and the Taff solicitations, which took place on working time.

The Board ordered the Republic Company to rescind

> "the rule against solicitation insofar as it prohibits union activity and solicitation on company property during the employees' **own time.**" (51 N. L. R. B. 1186, 1189.)

The Republic Company took the position that the Board's presumption of illegality of the limitation on the employee's own time was improper, and that it was necessary for the Board to show that union organization would actually be interfered with by a rule forbidding solicitation on the employer's premises at any time. The important issue in the Republic case which is material in this case is the propriety of the Board's adopting the presumption that a rule prohibiting union solicitation on the employer's premises outside of working hours

> "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary **in order to maintain production or discipline.**"

This is the Board's doctrine as stated in the Peyton Packing Co. case (49 N. L. R. B. 828, 844) cited by the Board, and this Court approved the Board's presumption in the Republic case and commented on the **failure of Republic to make any effort to show facts which would rebut this presumption.**

The question considered by this Court was the conflict between "the undisputed right of self-organization" and "the equally undisputed right of employers to **maintain discipline** in their establishments" (l. c. 797-98). This Court said (l. c. 801):

> "No evidence was offered that any unusual conditions existed in labor relations, the plant location or

otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment."

In an industrial plant (since the public is not involved), the **only** problems **are** production and discipline, and unless the rule is shown to be necessary because of one or the other, it is invalid under the Board's presumption. But in a department store the factor of public access is also present, as the Board admits by proscribing all solicitation on the selling floor. The present case is readily distinguishable from the Republic case, not only because the record so fully shows the special circumstances found wanting in the Republic case, but because the **Board itself has recognized the existence of these special circumstances to the extent of prohibiting solicitation on the selling floor even on the employee's own time. The only remaining question then is the question of law, where the Board itself has recognized that a very substantial limitation on the use of the employee's own time for soliciting is proper in Petitioner's department store, how arbitrary the Board can be in ordering the modification of a rule, adopted long prior to any union activity, common in the industry, agreed to contractually by this Union in other contracts with other department stores (and therefore presumptively not unreasonable or unlawful), and in effect contractually between this same employer and the A. F. L.** (Tr. VII, RX. 63, 4907; RX. 66, 4913; RX. 68, 4919); **especially where, as will be shown, it would be impossible to administer the rule proposed by the Board, and defined by the Court below.**

The Board's recognition of the propriety of some restriction on the use of the employees' own time in this case is obviously due only to the distinction between **any** manufacturing plant and **any** retail store. We think the opinion of this Court in the Republic case makes it clear that

its approval of the Board's presumption was limited to **industrial** establishments, since this Court said (l. c. 804):

> "The Board had previously considered similar rules in **industrial** establishments and the definitive form which the Peyton Packing Co. decision gave to the presumption was the product of the Board's appraisal of **normal** conditions about **industrial** establishments."

The Court below quoted at length from the Board's decision in the Matter of Peyton Packing Co. (49 N. L. R. B. 828, 844), including the language

> "such rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

And the Court below then held that it was "**required to hold**" that the Board was warranted in directing the Petitioner to rescind its rule in so far as it prohibits union solicitation off the selling floor during nonworking hours, ignoring completely the fact that the Board itself had found that the presumption did not apply in this case. The Court said (Tr. VIII, 6):

> "For the Board to have tested the no-solicitation rule in this case on the basis of the **presumptions** and **requirements of proof** which it has thus established was therefore neither improper nor unreasonable. And, on the record, **we are required to hold** that the Board was warranted in declaring, 59 N. L. R. B. at page 981: 'The respondent has adduced no convincing evidence that such a blanket injunction [no union solicitation on any part of the premises at any time] bears reasonable relation to the efficient operation of its business. However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the

> solicitation, if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business. We therefore find that the respondent's rule is invalid, and violative of the Act, only insofar as it prohibits union solicitation off the selling floor during nonworking hours (such as luncheon and rest periods).' "

The Court below declined (Tr. VIII, 8) to comment on the difference between an industrial plant such as that involved in the Peyton and Republic Aviation cases, and the Petitioner's department store, except to say:

> "The Board observed as to the alleged difference in situation between an industrial plant and a department store, 59 N. L. R. B., at page 981, that it could perceive 'no reasonable basis for distinguishing between the two types of enterprises so far as concerns a general prohibition against union solicitation by employees during nonworking hours at all places on the respondent's premises.' "

The Court below decided only that the Board lawfully may establish **presumptions and requirements of proof** by which to test a no-solicitation rule, that such **presumptions and requirements of proof** have been sanctioned by this Court and that the test was not unreasonably applied. But even if, for the sake of argument, we agree to all that, the Court has not considered or passed upon the question of law involved. **The Board itself found that it was lawful in Petitioner's department store to impose restrictions on the use of the employees' own time for solicitation in the store premises, and, therefore, the presumptions and requirements of proof cannot control or affect the decision of the legal question presented to the Court.** Doubtless under the decisions cited by the Court below, the Board may establish presumptions and requirements of proof and, in the absence of evidence of special circumstances,

may test a no-solicitation rule by the use of such presumptions and requirements of proof. However, the Board itself found that under the circumstances of this case the presumptions do not apply.

In this case, as shown by the Opinion, the Court below has not considered the evidence before it and has not passed upon the legal question presented to it. Whether or not the Petitioner's no-solicitation rule is lawful under the facts and circumstances shown by the undisputed evidence in this case is a matter of law for the Court to determine. **Midland Steel Products Co. v. N. L. R. B.**, 113 F. 2d 800, l. c. 805.

Petitioner operates a retail department store. Its business is the sale of merchandise and services. It is entitled lawfully to restrict the use of its premises to the conduct of its business and lawfully to prohibit solicitation on its premises for any other purpose. The undisputed evidence here shows that the rule was adopted years ago for sound operating reasons, that it has been enforced universally and traditionally in retail department stores and that it has been recognized as proper in contracts with department stores by this Union as well as by the A. F. L.

The Court below, although not stating that the Board's language, "off the selling floor during nonworking hours (such as luncheon and rest periods)" is unworkable, nevertheless supplied definitions of the term "selling floor" and the term "nonworking hours". In its Opinion (Tr. VIII, 8) the term "selling floor" is defined by the Court below as follows:

> "to embrace those parts of the store where **sales of commodities** are made to customers in general course and to exclude those parts not so used and where customers normally are not present for such purposes."

The term "nonworking hours" is defined by the Court below (Tr. VIII, 8) as follows:

> "**by and of employees**, all of whom are on nonworking time (such as established luncheon or permitted rest periods)."

In so defining the terms used by the Board, the Court below has supplied a certain degree of definiteness which was absent from the Board's order, but the Court-defined Board rule still remains unworkable. For example, it limits the selling floor to those parts of the selling floor where sales of **commodities** are made—but the Court overlooked the sales of **services**, such as those made in the beauty parlors, barber shops, shoe repair departments, alteration rooms, etc., and those services which are rendered to customers without specific charge, such as credit, wrapping, mailing, lost and found, complaints, etc. And the definition of "nonworking hours" also remains unworkable. Particular reference is made in the opinion of the Court below to nonworking time at luncheon, but the nonworking time of those employees who are eating is the working time of counter girls, waitresses, bus boys and other lunch room attendants. The nonworking time of those on rest periods is the working time of the employees at the soda fountain, where employees customarily spend rest periods (Tr. II, 953; III, 1721; IV, 3210, 3211). The nonworking time of employees riding the employees' elevators when off duty is the working time of the elevator operators and the elevator starters and of other employees riding the elevators from floor to floor on errands required by their duties.

The attempt by the Court below to make definite the Board's language only serves to illustrate the necessity for the rule which has been in effect for many years in Petitioner's store and in other department stores throughout the country, and the difficulty which flows from at-

tempts by administrative bodies to impose theoretical rules upon practical business operations.

We submit that there is nothing in the National Labor Relations Act which grants to the Board the right to substitute its judgment on operating problems for the operating rules which have been established through many years of practical experience in the retail business. We submit that the attempt of the Board to revise such rule is beyond its jurisdiction. We submit that the Board's neither fish nor fowl rule is completely arbitrary. We submit that the validity of Petitioner's rule is a question of law for the Court to decide under the facts and evidence before the Court and that the Board's decision is not in any way conclusive. We submit that in this case the Board's attempt to declare invalid any part of Petitioner's rule against solicitation, and to supply in lieu thereof the Board's own notion of what a rule should be in a retail store, is unlawful and void and should not be enforced.

We submit respectfully that this case presents an important question of federal law which has not been, but should be, decided by this Court. The Court below refused to decide the question, believing, as it said, that the Board's decision was final and conclusive. In that respect the decision of the Court below is in conflict with the decision of the Sixth Circuit in the case of Midland Steel Products Co. v. N. L. R. B., 113 F. 2d 800, 805, and it is in conflict with the National Labor Relations Act, for that act makes the Board's decisions conclusive only on questions of fact if supported by substantial evidence and not at all on questions of law. As shown by the undisputed evidence in this case the rule has been traditionally and universally adopted and enforced in retail stores because of the nature of the business carried on in such stores. The validity of that rule is of great importance not only to this Petitioner but to the entire retail and service in-

dustry, and we submit that this Court should decide the question, which the Court below refused to decide, presented by this case as to the validity of the rule against solicitation in a retail department store.

B.

LIMITATIONS ON INFERENCE-DRAWING AND FACT-FINDING POWER OF THE BOARD.

The Court below accepted as conclusive the Board's inferences which are unsupported by any evidence, or are based solely upon uncorroborated and controverted hearsay or circumstantial evidence, thereby holding, in effect, that the inference-drawing power of the Board permits the Board, and requires the reviewing Court, to dispense with the statutory requirement that the Board's findings must be supported by substantial evidence. The Board's power to draw inferences is not a substitute for the requirement that the Board's findings of fact be supported by substantial evidence. The number and the nature of the errors in the Board's findings of fact deprive the Board's inferences of any evidentiary support whatever. Inferences based upon such erroneous findings and upon uncorroborated hearsay and circumstantial evidence cannot prevail in the face of direct substantial evidence to the contrary.

The holding of the Court below that the Board's findings unsupported by any evidence, or based solely upon uncorroborated hearsay or circumstantial evidence, are conclusive upon the reviewing Court is in conflict with the decisions of this Court and with many decisions of other Circuit Courts of Appeals which hold that findings of fact and inferences drawn by the Board must be supported by substantial evidence and may not be grounded solely upon uncorroborated hearsay evidence, and that inferences are binding upon the reviewing Court only when they are reasonably, legally and legitimately drawn from facts

established by substantial evidence, and that factual conclusions which rest upon inferences cannot prevail in the face of direct contradictory evidence.

Petitioner contended below that there was not substantial evidence to support the Board's finding of violation of either Section 8 (1) or Section 8 (3), and Petitioner pointed out in its Brief (with ample record citations) a large number of the errors and omissions in the Board's decision.

The Court avoided any discussion of the validity of Petitioner's objections to the factual errors in the Board's Decision, but said that it

> "**must** hold that there is sufficient evidence to support each of the Board's material findings, within the tests applicable on reviews of the Board's orders under the decisions of the Supreme Court"

because, as the Court said:

> "The position of the Company fails to take sufficient account of the **broad scope of inference** open to the Board **on questions of motive** and discrimination, where the evidence indicates a desire to thwart or nullify unionizing efforts, either generally or as to a particular employee-organization. And the Company also overlooks the **accreted force** which conduct may acquire in its setting of totality, by attempting to **focus separately** upon each of the incidents" (Tr. VIII, 8, 9).

The Court here says, in effect, that it is immaterial how many errors and omissions there were in the Trial Examiner's Report and in the Board's Decision and Order or how valid were Petitioner's numerous exceptions, because of the power of the Board to draw inferences "where the evidence indicates a desire to thwart or nullify unionizing efforts."

This is so far beyond any previous decision as to the binding effect of the Board's inferences on the reviewing Court, and so far out of line with other decisions, as to appear to have been especially designed as an invitation to this Court to define the limitations, if any, on the Board's power to draw inferences.

The Court says that it **must** hold that there is sufficient evidence to support each of the Board's material findings; but, in view of the Court's failure to discuss the facts or to say which of the Board's findings **are** material, or to say **what** evidence supports such findings, and in view of the Court's assumption that the validity of Petitioner's objections to the numerous factual errors and omissions of the Board is immaterial, it is most inconsistent for the Court to rely so heavily upon "the **accreted** force which conduct may acquire in its setting of totality", while refusing to consider as at all material Petitioner's proof that so many of these accretions were pure figments of the Board's imagination. Surely, if the Board bases its inferences on erroneous findings of fact, Petitioner should have the right to point out these errors. It is neither logical nor reasonable, but, on the contrary, is most inconsistent, for the Court to rely on the accreted force of Petitioner's alleged activities, while in the same breath dismissing as immaterial Petitioner's showing that the alleged accreted facts were erroneous, by saying that Petitioner should not "focus separately upon each of the incidents"—even to show that there was no proper factual basis therefor.

The only theory upon which the Court's reasoning can be deemed at all consistent is that the Board's power to draw inferences of anti-union motivation for a discharge is unlimited if there is any basis in the entire record for the suspicion that Petitioner desires to thwart or nullify unionizing efforts. Only on such a theory would it be consistent for the Court to refuse to consider either the

number or the character of the errors and omissions in the factual basis for the Board's Decision. This is certainly in conflict with the decisions in other Circuits, which hold squarely that it takes more than a general anti-union attitude plus the discharge of a union member to support the inference of discriminatory motive.*

Not only does this decision conflict with other decisions, but the question is one of paramount importance in the administration of the Act. And, therefore, it seems to us that this Court should settle this question so that the Courts and the Board and all concerned may know how broad is the scope of the Board's power to draw inferences and what limits, if any, there are thereon.

We submit that the scope of the Board's power to draw an inference of discriminatory motive is no less subject to the usual limitations in a case where (for the sake of argument) a general anti-union animus may be found, than in any other case.

As stated by Judge Lamm of the Missouri Supreme Court in the case of **Mockowik v. Railroad**, 196 Mo. 550, l. c. 571:

> " 'Presumptions,' as happily stated by a scholarly counselor, ore tenus, in another case, 'may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' "

What was so aptly said of "presumptions" in that case is equally applicable to "inferences" in the present case, for, as has been said, where the Board's—

> "conclusion rests on inferences, such cannot prevail in face of direct evidence to the contrary." **A. E.**

* N. L. R. B. v. Goodyear Tire & Rubber Co. (C. C. A. 5), 129 F. 2d 661, 667;
Hazel Atlas Glass Co. v. N. L. R. B. (C. C. A. 4), 127 F. 2d 109, 117;
N. L. R. B. v. Riverside Mfg. Co. (C. C. A. 5), 119 F. 2d 302, 307.

Staley Mfg. Co. v. N. L. R. B. (C. C. A. 7), 117 F. 2nd 868, 878.

Judge Johnsen's opinion in the present case cites the case of **N. L. R. B. v. Nevada Consolidated Copper Corporation,** 316 U. S. 105, as its principal authority for this new concept of the broad scope of inference open to the Board. But that case is authority merely for the proposition that

> "The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them, as the Court below seems to have thought" (l. c. 106).

In other words, if there is substantial evidence to support the inference that the discharge in question was discriminatory and also substantial evidence to support the inference that the discharge was for cause, the Court may not interfere with the Board's choice of inference.

But this does not mean that because the Board says there is a general anti-union animus and that it has drawn an inference of discriminatory motive therefrom, the Court is thereby precluded from going into the question of whether or not there is substantial evidence to support the inference.

As the Court said in the case of **Owens Illinois Glass Co. v. N. L. R. B.** (C. C. A. 6), 123 F. 2nd 670, 671:

> "The Board is the sole judge of the sufficiency of the evidence in fact; the court is the sole judge of its sufficiency in law. If this were not so, the power to determine questions of law, as well as questions of fact, would be lodged in the Board and the statutory right of review by the court would be a nugatory power."

The Nevada Consolidated Copper Corporation case, supra, **assumes** that there **was** substantial evidence to support an inference of discrimination, and the opinion of the Circuit Court of Appeals in that case (122 F. 2d 587) shows that such was the case.

The provision of the National Labor Relations Act that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, means that the findings must be supported by **substantial** evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; or evidence having rational probative force. And mere uncorroborated hearsay or rumor does not constitute substantial evidence. It must carry such conviction that a person of ordinary mind might reasonably accept it as adequate upon which to form a definite conclusion. **Consolidated Edison Company v. National Labor Relations Board**, 305 U. S. 197, 229-230.

In the present case the Circuit Court of Appeals has construed the Nevada Consolidated Copper case as authority for the proposition that the power of the Board to draw inferences is so great that it is not subject to review by the Court, even though the Board reached its inference without considering all the evidence, and in reliance upon improper evidence, and in reliance upon flimsy conjecture, and on uncorroborated hearsay, and on a clearly erroneous conception of the facts shown by the record, and by ignoring all testimony favorable to Petitioner—even where uncontradicted.

It is our contention that the Board's power to draw inferences does not dispense with the necessity for substantial evidence; that the record must contain substantial evidence from which a discriminatory discharge may be found before the Board is entitled to exercise the right to draw **either** of two inconsistent inferences; that not only was there no substantial basis for the finding of discrim-

ination in this case, but that there was overwhelming affirmative uncontradicted evidence to the contrary, all of which was ignored; and that the Board cannot sustain a finding of substantial evidence in this case on the basis of the tests which have been established for the measure of substantial evidence. Nor can the Board substitute for substantial evidence its power to draw either of two inconsistent inferences, in the absence of substantial evidence to support **both.**

The Board has the authority to determine from the evidence whether or not an employee has been discharged for union activity—in other words, to determine the **cause** of the discharge. This does not mean (as the Court below seemed to think) that, simply because the Board **says** that the motive for a discharge was discriminatory, the Court must accept that inference unless the reason assigned for the discharge has been conclusively shown to be the sole reason for the discharge. Is not the burden on the Board rather than upon the employer? On Judge Johnsen's theory, as more fully propounded in his dissenting opinion in the case of **Dannen Grain & Milling Co. v. N. L. R. B.**, 130 F. 2d 321, 330, if an employer has ever run afoul of the Wagner Act, then the Board's right to draw inferences is especially enhanced and it could never be conclusively proven to the Court that the employer's motive was not in any way, or to any degree, to dispense with a union member. The broad power of inference ascribed to the Board in such a case would make such a conclusive demonstration impossible.

But nothing in the decisions of this Court, cited by the Court below, and nothing in the Wagner Act, changes the basic requirement that there must be substantial evidence to support the Board's finding; that uncorroborated hear-

say is not substantial evidence* (nor is there corroboration in the circumstances referred to in the opinion below); that the Board may not ignore all material uncontroverted testimony favorable to the employer,** and may not rely upon vague, incoherent, confused and contradictory statements, as substantial evidence,† or choose only the most favorable of the conflicting statements of the most favorable Board witnesses. And that inferences cannot stand against direct evidence to the contrary,‡ nor if based upon incompetent evidence.‡‡

It is obviously impossible within the limits of conciseness to demonstrate, as we did to the Board and to the Court below, that the material findings of the Board are not supported by substantial evidence and that the inferences drawn by the Board have no basis in fact—particularly since the Court has not disclosed which of the Board's voluminous findings it deems material. Perhaps such

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* Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229-230;
N. L. R. B. v. Washington Dehydrated Food Co. (C. C. A. 9), 118 F. 2d 980, 985;
N. L. R. B. v. Ford Motor Co. (C. C. A. 6), 114 F. 2d 905, 915;
Martel Mills Corp. v. N. L. R. B. (C. C. A. 4), 114 F. 2d 624, 629;
N. L. R. B. v. Bell Oil and Gas Co. (C. C. A. 5), 98 F. 2d 406, 409.

** N. L. R. B. v. Indiana & Mich. E. Co., 318 U. S. 9, 28;
N. L. R. B. v. Laister-Kauffmann A. Corp. (C. C. A. 8), 144 F. 2d 9, 16;
N. L. R. B. v. A. Sartorious & Co. (C. C. A. 2), 140 F. 2d 203, 205;
American Smelting & Ref. Co. v. N. L. R. B. (C. C. A. 8), 126 F. 2d 680, 688;
N. L. R. B. v. v. Washington Dehydrated Food Co., 118 F. 2d 980, 985, 995;
N. L. R. B. v. Union Pac. Stages (C. C. A. 9), 99 F. 2d 153, 177;
Western Cartridge Co. v. N. L. R. B. (C. C. A. 7), 134 F. 2d 240, 244;
N. L. R. B. v. Grieder Machine Tool & Die Co. (C. C. A. 6), 142 F. 2d 163, 165.

† N. L. R. B. v. Brown-Brockmeyer Co. (C. C. A. 6), 143 F. 2d 537, 542;
N. L. R. B. v. Thompson Products Co. (C. C. A. 6), 97 F. 2d 13, 15.

‡ A. E. Staley Mfg. Co. v. N. L. R. B. (C. C. A. 7), 117 F. 2d 868, 878.

‡‡ Berkshire Knitting Mills v. N. L. R. B. (C. C. A. 3), 139 F. 2d 134, 137;
N. L. R. B. v. Ford Motor Co. (C. C. A. 6), 114 F. 2d 905, 915;
Midland Steel Products Co. v. N. L. R. B. (C. C. A. 6), 113 F. 2d 800, 805;
N. L. R. B. v. Empire Furniture Co. (C. C. A. 6), 107 F. 2d 92, 95;
N. L. R. B. v. Bell Oil & Gas Co. (C. C. A. 5), 98 F. 2d 406, 410;
Doyle Dry Goods Co. v. Lewis (C. C. A. 8), 5 F. 2d 918, 921.

demonstration is unnecessary because of the implication contained in the opinion of the Court below that we demonstrated the insufficiency of the evidence to support each individual finding by focusing attention "separately upon each of the incidents", but that this was immaterial because of the broad power of the Board to draw inferences from the accreted force of such incidents in their setting of totality. However, we believe that we can show conclusively by an example of an 8 (3) solicitation case and by an example of an 8 (3) case not involving the no-solicitation rule, not only that the Board's inferences are contrary to the undisputed facts, but that the reasons assigned by the Board for its inferences of motive have been applied by the Board in such an arbitrary and inconsistent manner in this very case as to preclude any reasonable mind from accepting such inferences.

The test for the validity of an inference has been aptly stated as follows:

> ". . . whether reasonable and unbiased minds could have reached the conclusions and made the findings that were made." **Stonewall Cotton Mills v. N. L. R. B.**, 129 Fed. 2d 629, 631 (C. C. A. 5),

or

> ". . . whether reasonable minds **having no interest as accuser** or otherwise, in the result, but wholly impartial, could, upon the evidence, have legally and fairly drawn the fact inferences, made the fact findings." **Magnolia Petroleum Corp. v. N. L. R. B.**, 112 F. 2d 545, 549 (C. C. A. 5).

Stewart as an Example of Sec. 8 (3) Solicitation Cases in Which the Board's Inferences Are Unjustified.

One of the seven former employees who was discharged by the Petitioner for violation of the rule against solicitation, and whose reinstatement was ordered by the Board

and approved by the Court below, is Eva Stewart. Briefly, the undisputed facts, shown by her own testimony and by documentary evidence relating to Stewart, are as follows:

On September 26, 1942, Stewart was suspended for two weeks because of her violation of the rule against solicitation in that she, as shown by her own testimony, solicited two salesmen to join the C. I. O. at times while both Stewart and the salesmen were at work (Tr. III, 1870-74). At the time of her suspension she was interviewed by Petitioner's Employment Superintendent, McCarthy, who told her that an investigation made by the Company's attorney showed that she had violated the rule against solicitation, which she did not deny but in effect admitted by saying "Did I?"; and by saying that she "did not remember" whom she had solicited (Tr. III, 1847).

On October 12, 1942, Stewart returned to work at the end of her period of suspension. She was wearing her C. I. O. membership button and another button indicating that she was a member of the C. I. O. Master Committee (Tr. III, 1855). She testified that before she went back to work **McCarthy asked her not to solicit any more**, and that he remarked to her Department Manager, "Here is a good girl back" (Tr. III, 1854). But her testimony shows that she immediately began to solicit in violation of the rule (even as modified by the Board) and solicited a stamp cashier repeatedly over a period of two days while Stewart was at work in her department and also while the cashier was at work in her department, and in the presence of customers (Tr. III, 1876-1883; VII, 4864-4865). She was discharged on October 15 for violation of the no-solicitation rule (Tr. III, 1862). At her termination interview McCarthy told her of the report which had come to him that she had continued her solicitation in violation of the rule. She did not deny it but merely asked him to "prove it" (Tr. III, 1864). At the hearing she readily admitted violating the rule (Tr. III, 1876-1883), and that she violated it with full knowledge of the consequences (Tr. III, 1898-99).

Under the evidence there is no doubt that Stewart deliberately, repeatedly and flagrantly violated the Board approved rule, on the selling floor and during her working hours, and in the presence of customers. She knew of the rule (Tr. III, 1847-8) and knew she would be discharged for her violation of it (Tr. III, 1899); and the Board made no finding to the contrary. The question which arises is how the Board could have arrived at an inference or conclusion, based on more than surmise or suspicion, that Stewart was discharged because of her union affiliation, and not because of her violation of the rule?

The inferences on which the Board based its finding that both the suspension and discharge of Stewart violated Section 8 (3) of the Act are set forth in the Board's order as follows:

> "We have found above that the respondent enforced its no-solicitation rule discriminatorily against adherents of the Union. It follows that the discharges and lay-offs of union members Brown, Schneider, Rosciglione, Moore, Taff, **Stewart**, and Athanas for alleged or actual violations of that rule were discriminatory and violative of Section 8 (3) of the Act.
>
> "Aside from the respondent's discriminatory enforcement of the rule against adherents of the Union, independent basis exists for a finding that the respondent discharged or laid off the aforementioned employees because of their union membership and legitimate union activities and not because of any alleged violation of the respondent's no-solicitation rule. **In each of these cases, the respondent's decision to discharge or lay off the employee was made on the basis of a third person's version of what had occurred**, and the respondent, contrary to its professed practice, made no effort to obtain the accused employee's version before reaching the decision to discharge or suspend him. **The failure to conduct a**

fair investigation, coupled with **the respondent's general antipathy to the Union,** clearly evidenced the respondent's eagerness to rid itself of union adherents and strongly **suggests** that **the real motive underlying the discharges and lay-offs was the respondent's anti-union animus, rather than any sincere belief on its part that the employees in question had violated the rule, or any real concern by it over the fact that the rule had been violated''** (Tr. R. 156-7).

Briefly summarized, these inferences are (1) discriminatory enforcement of the rule, (2) third-party investigation, (3) anti-union animus, and (4) no real concern over violations of the rule.

(1) The Board's inference that the Petitioner enforced its no-solicitation rule discriminatorily is based by the Board (Tr. R. 153) and by the Court below (Tr. VIII. 9-11) upon the alleged inference that the Petitioner (long after Stewart's suspension and discharge) knowingly permitted an employee, Gilley, to solicit for the A. F. L. without reprimand or discharge. In the Court below we demonstrated that there was no evidence, except uncorroborated hearsay (which was extremely vague and self-contradictory hearsay), that Gilley did solicit, and there was no evidence to support an inference that Petitioner had knowledge of the solicitation, if any, by Gilley and there was no evidence to support any inference as to whether or not Petitioner did or did not reprimand Gilley. The Court below recognized that uncorroborated hearsay is not substantial evidence, but found corroboration in various circumstances the like of which have never before been considered by any Court as corroboration. The facts found by the Court as sufficient to corroborate the vague and self-contradictory hearsay testimony of Frank, vice-president of the Union, were that the assistant buyer to whom Frank haltingly testified he **thought** he had mentioned the solicitation (but not in a manner of reporting it [Tr. IV,

2965], or in such a way as to expect any action to be taken on it [Tr. IV, 2965]) and who the testimony showed was ill at the time (Tr. IV, 2965), was not called to refute the testimony that Frank **thought** he had mentioned the fact to this assistant buyer (who was himself eligible to belong to the union) (Tr. III, 1707, 2083; IV, 3038, V, 3323); that no one undertook to explain why the company made no reply or took no action in relation to the Union's published charge that Gilley was soliciting with impunity because the A. F. L. had "the company's blessing"; that the general manager did not deny the conversational incident with Gilley following the publication of the bulletin or its connection with the Union's accusation (when there was absolutely no testimony as to the subject matter of the conversation testified to between the Petitioner's general manager and Gilley or that it had any connection with her alleged solicitation or the union circular); and that none of the employees named in the testimony (Tr. IV, 2932, 2945) of the vice president of the union was called **by the Petitioner** to deny Gilley's solicitation of them. It would be a strange doctrine indeed that would require the respondent to call witnesses to corroborate the hearsay testimony of the Board. The only exception noted by the decisions of this Court to the rule that uncorroborated hearsay will not be accepted as substantial evidence is where no means of corroboration are at hand. Clearly it is the duty of the party tendering the hearsay evidence to show that it is the best evidence possible and the reason why it cannot be corroborated. Yet in this case the witness Frank himself twice testified, when pressed for details, that he could not remember, and that the witnesses who could give the direct testimony as to the solicitation were available (Tr. IV, 2932, 2945); and they could have been called by the Board. We know of no case in which any such circumstances have been considered corroboration, especially where the record is clear from

the testimony of the witness relied upon by the Board that the means of corroboration were readily available. **And we know of no other case in which failure of one party to call witnesses to refute hearsay testimony offered by the other party, has been accepted as corroboration of the hearsay.**

In any event, the testimony of Frank was so vague and self-contradictory, so evasive, and so obviously not believed by the Trial Examiner at the time of the hearing, that it has no rational probative force, and is not such evidence as a reasonable mind might accept as adequate to support the conclusion that Gilley was openly soliciting for the A. F. L. on the selling floor during business hours with the knowledge of responsible officials of the Petitioner and that it, therefore, follows that the discharges of several C. I. O. members several weeks earlier for clear violations of the rule, after repeated warnings, were because of their union membership. Aside from the hearsay nature of this testimony, **its vagueness, incoherence and evasiveness is shown by the analysis of Frank's testimony which appears as an appendix at the end of this brief.**

The entire basis of the finding of the discriminatory enforcement of the rule is that Frank, the Union vice president, testified that, although he was never able to overhear Gilley soliciting (Tr. IV, 2933-4), several persons (whom the Board **could** have produced) **told him** that they had been solicited by Gilley to join the A. F. L.; and that he mentioned the fact to an assistant buyer and that he **thought** the assistant buyer had said that he knew it. This is the entire proof of the solicitation for the A. F. L. and the knowledge thereof by Petitioner. There was no proof that Gilley solicited on the selling floor, and, even if Frank's hearsay is counted as evidence, there is not even that type of evidence that anyone above the grade of assistant buyer had knowledge of it. And even his dubious

knowledge was not **claimed** to exist until several weeks after Stewart's suspension and discharge. How then could this establish a discriminatory motive retroactively?

In order to show the invalidity of the Board's inference of improper motive based on the Gilley incident, it should be sufficient to note that the Petitioner's knowledge of the alleged **fact** of her solicitation (as distinguished from the Union's circular claiming that she had solicited) is not claimed to have existed (even through assistant buyer Levy) at the time Stewart was suspended and discharged, but not until several weeks **after** the Stewart suspension and discharge (Tr. III, 2955-2963) and the other discharges of C. I. O. members referred to in the Board's order.

Moreover, it should be noted that this case was originally consolidated with Board case No. 14-C-650, which was based on the alleged discriminatory discharge of an **A. F. L. member**, Glazebrook, for violation of the same rule against solicitation (Tr. VI, 4354).

Thus there is no evidence to support any inference of discriminatory motive in the enforcement of the rule in the suspension and discharge of Stewart (or indeed in the case of any other employee).

(2) As to the investigation by a third person, Petitioner's counsel, the evidence showed that the reason for this was a desire by the Petitioner to avoid violation of the stipulation of September 14, 1942*. Nor is there any basis for the inference that the unusual care with which these investigations were made by a trained investigator, constituted a "failure to conduct a fair investigation". The uncontradicted testimony was that at the time the Settlement of September 14, 1942, was being discussed, the matter of offering reinstatement to Glazebrook came up and that McCarthy expressed concern over whether the

* At that time a stipulation was entered into for the settlement of all outstanding charges pending against petitioner with the N. L. R. B.

reinstatement of Glazebrook (who had been discharged for violating the no-solicitation rule) would weaken Petitioner's enforcement of its no-solicitation rule, but was assured by counsel that it would not (Tr. VI, 4354); that because of the agreements contained in the Stipulation and the Petitioner's desire to comply, and the possibility of questions of legal interpretation arising, he took the precaution of turning the reports of violation of the solicitation rule over to counsel for investigation and report (Tr. VI, 4353); that these matters were turned over to a partner in the law firm which acts as general counsel for the Company, and a lawyer of recognized and admitted integrity and ability (Tr. VI, 4231); that the attorney was free to carry out the investigation in such manner as he saw fit (Tr. VI, 4353); that the attorney made the investigations and even went so far as to obtain affidavits (Tr. VI, 4354); that the attorney reported back to McCarthy in due course with the affidavits in each case; that McCarthy read the affidavits and believed and relied upon the facts stated therein as being true; and that based upon the facts stated in the affidavits in each case and his reliance on the truth of these facts and upon the attorney's opinion that in each case he believed there had been a violation of the store rule, and that a suspension or discharge of the offending employee would not be in violation of either the Stipulation or the Wagner Act, McCarthy suspended Stewart (Tr. VI, 4383-4) and discharged Athanas (Tr. VI, 4355-6), Stewart (Tr. VI, 4385), Schneider (Tr. VI, 4382), Moore (Tr. VI, 4379), Rosciglione (Tr. VI, 4381), and Taff (Tr. VI, 4386). The undisputed evidence also shows that several others whose reported solicitation was similarly investigated by the attorney were not suspended or discharged because the attorney's report was negative (Tr. II, 1045; VI, 4449, 4451). Among these cases were such prominent C. I. O. workers as Stolte (a Union Steward) who had been reported for

soliciting by the A. F. of L. (Tr. II, 1045; V, 3700, 3713), and Pronay (a member of the C. I. O. Master Committee) (Tr. II, 1045; VI, 4451).

But, since Stewart readily admitted her violations as established by the attorney's investigations, there is no doubt that the result of the investigation was accurate, and that no other or different form of investigation could have brought a different result. And if it be claimed that the Board was justified in drawing an inference of discrimination from the nature of the investigation, then we wish to point out that in the case of the Brown suspension it did not matter to the Board that there was no departure from the customary practice of merely calling the suspected employee to the employment office for a discussion of the charge against him. While Brown testified that he denied soliciting when accused of having done so (although he admitted it in his testimony), both McCarthy (Tr. VI, 4543) and Brown's buyer (Tr. V, 3906) testified that he admitted it at the time he was suspended. And there is ample confirmation of their testimony in Brown's own testimony that when (at the time of his suspension) McCarthy told him of the report that he had been soliciting, Brown referred to McCarthy's informants as "those dirty bastards" (Tr. II, 971), which was certainly enough to justify McCarthy in discounting Brown's original denial, if any. But the important point is that the Board made no distinction between Stewart and Brown because in Stewart's case there was a departure from the professed practice while in Brown's case there was not. It is hard to understand how the Board could draw an inference of discrimination against Stewart from the fact that the Stewart case was investigated by an attorney, and then draw the same inference of discrimination against Brown where there was no such investigation by an attorney.

Still further proof of the absence of any basis to support the Board's inference of discrimination in Stewart's

case, by reason of the attorney's investigation, lies in the fact that the Board dismissed the Lorey case. Lorey was a very active C. I. O. member and repeatedly violated Petitioner's rule by soliciting for the C. I. O. in the store during working hours (Tr. III, 2426-2428). When this violation was reported, an investigation was made by Petitioner's attorney; and as a result of this investigation and the affidavits which the attorney submitted to McCarthy (Tr. I, 845, VII, 4852-4855), Lorey was discharged. The discharge, however, was not for violation of the rule against solicitation (at that time the current discipline for such violation being only suspension, Tr. I, 117, 119; VII, BX. 21, 4788), but because Lorey signed the name of the floorman to a sales check, which fact was discovered by the attorney in the course of his investigation of the report of solicitation (Tr. III, 2386-87). The Board found as to Lorey:

> "We agree with the finding of the Trial Examiner that **Lorey's discharge was not discriminatory. The record discloses that Lorey, in violation of the respondent's rules, signed the name of his supervisor to a sales check, and that this was the reason for his discharge.** Accordingly, we shall dismiss the complaint insofar as it alleges Lorey's discharge to have been discriminatory" (Tr. R. 165).

Here is further proof of lack of any support for the Board's inference that Stewart's suspension and discharge were discriminatory because her violations of the rule, after repeated warnings, were investigated by the Petitioner's attorney. Lorey's violation was also investigated by the Petitioner's attorney, and yet the Board found his discharge was not discriminatory. And of course any anti-union animus which could be found to exist at the time of the Stewart suspension (September 26) and discharge (October 15) must certainly have been in

existence at the time of the Lorey discharge (September 29).

The Board specifically found that the reason for Lorey's discharge was the signing of the name of his supervisor to a sales check. In so finding it necessarily found (according to Judge Johnsen's reasoning as to the broad power of the Board to draw inferences as to motive) that Lorey's discharge was not motivated **in any degree** by Petitioner's desire to be rid of an active Union adherent. Since the Board based its finding of anti-union motivation on the method of investigation and on general animus, it is obvious that it was extremely inconsistent in the application of these factors which they evaluated at zero in the Lorey case and at 100% in the Stewart case. Can it be said that the Board has such broad power to draw inferences that it may even draw inconsistent inferences from the very same factors?

In the case of **N. L. R. B. v. Walworth Co.** (C. C. A. 7), 124 F. 2d 816, 817, the Court, although it sustained the Board's findings as to other unfair labor practices by the respondent, set aside the Board's order requiring reinstatement of three former employees who had been discharged after they, together with thirteen other employees, had signd a petition for an increase in wages. The Court said:

> "The record seems to us uttely devoid of evidence justifying the Board's inference that these three men were discharged because of their activity in signing a petition for a wage increase. **Had that been the reason all sixteen would have been discharged.**"

Further proof of the absence of any support for the Board's inference is furnished by the Sweeney case. Sweeney also was a very active member of the C. I. O. and repeatedly violated Petitioner's rule by soliciting for the

C. I. O. during working hours, according to his own admissions (Tr. II, 1584). The violations were investigated by the same attorney (Tr. II, 1546-47) and affidavits were secured (Tr. VII, 4841-42), but he was discharged for disregarding the warning of a supervisor as to entering a department other than his own. Despite his great union activity, which should have made Petitioner's animus as strong a factor in Sweeney's case as in Stewart's and despite the attorney's investigation of his solicitation, the Board held that Sweeney's discharge was not discriminatory (Tr. R. 164, 165). Here again the Board has drawn inconsistent inferences from the same fact, and from the application of the same factors.

(3) As to the Petitioner's alleged general antipathy to the Union, we cannot of course hope to discuss in this brief the facts which we believe show that there was no evidence to support this inference. It is proper, however, to point out that under the decisions discussed above an inference drawn by the Board that a company has a general antipathy towards the Union is not sufficient to support a further inference that an employee was discharged because of membership in or activity in behalf of the Union. But for the purpose of demonstrating the arbitrary and inconsistent evaluation placed by the Board itself on Petitioner's alleged anti-union animus, it should be noted that the Board drew an inference of discrimination based on union antipathy in the case of Brown who was not active in the Union, while holding the anti-Union animus of absolutely no moment in the cases of Sweeney and Lorey, who were both very active.

Brown testified that he joined the Union approximately September 15 (Tr. II, 940). He was suspended September 18 (Tr. II, 942). There was no evidence whatever (except the report of his violation of the rule against solicitation) that Petitioner had any reason to believe that Brown was a member of the Union at the time of his suspension, since

he testified that none of the salespeople were wearing union buttons at that time (Tr. II, 954), and, according to Brown's testimony, not even the other five salespeople in his own department knew he belonged until they asked him to join a few days later (Tr. II, 940, 958). Certainly Brown was not a conspicuous member of the Union at the time of his suspension. On the other hand, both Lorey and Sweeney were very active union members (Tr. III, 2391, 2462; II, 1584, 1585), and yet the Board held that the discharges of Lorey and Sweeney were not discriminatory.

The lack of basis for any inference of anti-Union motivation in the suspensions and discharges for solicitation is also emphasized by the uncontradicted evidence that Petitioner investigated reports of violations of its rule against solicitation by a number of other active union members, including Pronay, a member of the Master Committee (Tr. II, 1045; IV, 3130; VI, 4648), and Stolte, a Union steward, whose violation of the rule was reported by the A. F. L. (Tr. V, 3701), but that, because of the inconclusive results disclosed by the investigation, these active Union members were not discharged by the Petitioner.

Can it be claimed that the Board has such a delicate sense of perception as to justify an inference of discrimination in the discharge of Stewart, and the suspensions of Stewart and Brown, because of the alleged general antipathy towards the Union, while at the same time finding that the discharges of Lorey and Sweeney, both very active Union workers, were not discriminatory? Both Stewart and Brown admitted violation of Petitioner's rule against solicitation, and it cannot be denied that there were reasonable grounds for the disciplinary action taken by the Petitioner with respect to them. But the Board drew the inference that the Petitioner's suspension of Brown and Stewart, and the discharge of Stewart, were not because of their violation of the rule, but to rid itself of Union adherents. At the same time the Board drew

the directly opposite inference with respect to the discharges of Lorey and Sweeney, both of whom were very active, and in those cases the Board held that the discharges of Lorey and Sweeney were not discriminatory. We submit that no matter how broad the Board's power to draw inferences may be, it may not be exercised arbitrarily to arrive at opposite conclusions from the same facts, and that the Board has itself demonstrated that the alleged basis for its finding of anti-union motivation is completely unsound.

(4) Finally, the Board states that its inference of discrimination in the discharge of Stewart (and the others discharged for violating the rule against solicitation) rests upon its inference that the Petitioner had no real concern over the fact that the rule against solicitation had been violated. This inference is likewise contrary to the undisputed facts in the case.

The following chronology (based on documentary and otherwise uncontrovertible evidence) will show that Petitioner was not only interested in enforcing its rule, but was seriously concerned over its violation; and that, far from using the rule as a pretext to discharge Union adherents, Petitioner gave repeated warnings and did everything possible to obtain compliance with the rule before resorting to discharge as a last resort:

On November 27, 1941, the Company circulated a bulletin to all employees (BX. 28, Tr. VII, 4789) calling attention to its "no solicitation" rule in its entirety. This was in accordance with a common practice in department stores (Tr. VI, 4236-7, 4285) and with regular periodic notices previously issued by Petitioner (Tr. VI, 4084-6).

In May, 1942, Athanas was personally warned not to violate the "no-solicitation" rule, and, according to his own testimony, was told specifically that he would be discharged if he violated the rule (Tr. III, 1771, 1816).

On August 11, 1942, the Company circulated a bulletin

to all employees (BX. 29, Tr. VII, 4790) calling attention to its "no-solicitation" rule in its entirety. This notice was read and signed by every employee later suspended or discharged for its violation, except Taff, who was not in the Company's employ on that date (Athanas, Tr. III, 1817-1818; Brown, Bd. Ex. 119, Tr. II, 943; Moore, Tr. VI, 4232; Rosciglione, Tr. III, 1970; Schneider, Tr. II, 912; Stewart, Tr. III, 1897). However, Taff said she saw (but did not read) the large red-lettered notice of the rule (Tr. IV, 2670-2679) which was posted in September, several weeks prior to her discharge.

On August 22, 1942, Saar, a cashier, was suspended for two weeks for soliciting C. I. O. memberships in the store (Tr. VI, 4433).

On August 24, 1942, McClurg, a saleswoman, and a member of the Union Master Committee (Tr. IV, 2755), was called to McCarthy's office and told that he had been informed she was soliciting contributions contrary to the store rules, and that McCarthy had had to deal very seriously with an employee who had violated the rule (Tr. IV, 2737-2738).

On August 25, 1942, the C. I. O. distributed a provocative circular encouraging solicitation (RX. 51, Tr. VII, 4879, 4881).

On August 28th the C. I. O. distributed a circular (RX. 52, Tr. VII, 4883, 5) saying, "Now of all times no one will be discharged for Union activity."

In September Robertson, a porter, was called to the office of the Head Porter and told that there was a report that he was soliciting and was warned that if he was caught it would probably cost him his job (Tr. IV, 2800-1).

On September 10, 1942, Gunthorp, a porter, was called to the office of the Head Porter and told that he had been reported as having solicited members for the Union in the store, reminded that it was against the rules, and warned

that if it happened again it would be cause of dismissal (Tr. IV, 2795).

On September 14, 1942, Juergens, a saleswoman, and a member of the Union Master Committee (Tr. IV, 2961), was called to the office of her Department Manager and told that it had been reported that she had been soliciting membership in the C. I. O. Union on Company time and Company premises, and that any other solicitation would be just cause for immediate dimissal (Tr. IV, 2728).

On September 15th the C. I. O. got out a circular (BX. 204, Tr. VII, 4833, 5) saying, "Sign 'em up now," and to "use every free moment."

On September 18, 1942, Athanas (who had signed both the November, 1941, and the August, 1942, notice, and who had also received a personal warning in May, 1942 (Tr. III, 1772, 1773), was discharged for violation of the rule.

Later that morning McCarthy made a public address system announcement (BX. 17, Tr. VII, 4785), which again called the attention of all employees to the rule and warned against its violation. During this speech Brown openly ridiculed and flouted the rule (Tr. II, 964, 966). Later in the day he admitted having violated the rule and was suspended for two weeks (Tr. I, 803, 806).

On September 19th the Union's circular, "Famous Sayings" (BX. 35, Tr. VII, 4795), assured the solicitors that the Settlement Notices "will clearly state that Famous **will not in any way interfere with solicitation of Union membership**".

On September 19, 1942, Ottomeyer, a saleswoman, was called to McCarthy's office and told that it had been reported that she had solicited in the store for membership in the Union, but allowance was made for the fact that she had been on vacation the first three weeks of August, 1942, when the warning circular had been sent to her department (Tr. IV, 2780).

On September 23rd there was another provocative cir-

cular distributed by the Union (BX. 53, Tr. VII, 4887).

On September 24th "no-solicitation" rule signs were posted in several places throughout the establishment (BX. 14, Tr. VII, 4785).

On September 25th the Union circular said: "Where do they get this no-solicitation business" (BX. 33, Tr. VII, 4793).

On September 26th Stewart was suspended for two weeks for violation of the rule (Tr. VI, 4383-4).

On September 28th the Union distributed BX. 206 (Tr. VII, 4839), comparing the no-solicitation rule to a badly moth-eaten coat.

On or about September 29, 1942, Stolte, a cleaning woman and a member of the Union Shop Committee (Tr. IV, 3130), was called to the office of the Head Porter and told that she had been reported soliciting in the store during business hours, and was warned (Tr. V, 3837-8).

On October 3rd the rule was again brought to the attention of the employees by the Company on the public address system, and the announcement was made that there would be no further warnings (BX. 21, Tr. VII, 4788).

On October 6th the Union circular advised that the "repetition of the warning against solicitation has lost any effectiveness" (BX. 140, Tr. VII, 4811).

On October 8th the Union issued a circular (BX. 141, Tr. VII, 4815) implying that the **Labor Board** had advised that it was all right to sign people up on store property (without any limitation being suggested as to non-working hours or the selling floor).

On October 15th Stewart, who had returned on October 12th from her period of suspension and had promised to obey store rules thereafter, was discharged for again violating the "no-solicitation" rule (Tr. III, 1862, 1864). On the same day Moore was discharged for the same reason (Tr. III, 2098, 2099).

On October 16th Rosciglione and Schneider were discharged for violation of the rule (Tr. III, 1942, 1945, 1991, 1994); and on November 6th Taff was discharged for the same reason (Tr. IV, 2667, 2668).

Thus it will be seen that employees were discharged only after repeated warnings and after every other appeal and means of securing compliance had been exhausted.

The Board's inference that the no-solicitation rule was used simply as a pretext for ridding the store of Union members and sympathizers is completely inconsistent with the facts disclosed by the record and just recited, which show the Petitioner's reluctance to take disciplinary action to enforce its rule. If any inference may be drawn, it is that the epidemic of violation of the rule during this period was due to C. I. O. incitement to disregard the rule, as shown by the documentary evidence mentioned above and as confirmed by the testimony of C. I. O. witnesses Boggs (Tr. V, 3330-1, 3374-6, 3383) and Kramer (Tr. IV, 3204, 3307).

Moreover, in the case of Brown the undisputed facts shown by the record prove that there was no possible reason for Petitioner to discipline Brown except to enforce the rule. As shown above, Brown was not an active union member and Brown himself testified that the Petitioner knew prior to his suspension that he had been inducted and was to report for military service within a few days (Tr. II, 939). So that if the Petitioner had been concerned merely with ridding itself of a union adherent and not with the enforcement of its rule, Petitioner could have had no reason to suspend Brown, but would have simply ignored the incident and awaited Brown's induction into the military service in order to remove him from the store. Or, if Petitioner had not been concerned with the enforcement of its rule but had desired only to rid itself of union adherents, it would have discharged Brown so as not to

be required to re-employ him upon his return from military service. In any case, Petitioner's action in the Brown case is inconsistent with the Board's inference that Petitioner was not concerned over the violation of the rule but was only ridding itself of union adherents.

Thus it is seen that the undisputed facts in the record disprove rather than support the inference drawn by the Board that the suspension and subsequent discharge of Stewart (and of the other employees suspended and discharged for violation of the rule against solicitation) were discriminatory and in violation of Section 8 (3) of the Act.

The inferences drawn by the Board with respect to the other employees whom the Board ordered Petitioner to reinstate and who were not discharged for violation of the rule against solicitation are likewise unsupported by any substantial evidence but are directly contrary to the undisputed facts. We will mention only an example.

Marchand as an Example of Sec. 8 (3) Cases Not Involving Solicitation in Which the Board's Inferences Are Unjustified.

As to Marchand, the Board rests its inference upon a series of five statements, as follows:

> "The following circumstances indicate that the respondent's discharge of Marchand was discriminatory: **(a) the patent falsity of the reason advanced by the respondent for its action**, namely, unexplained absence, in view of the evidence, which we credit, that Marchand had made timely report to the respondent of the reason for her absence, and had kept the respondent informed about her illness and advised it that she intended to return to work as soon as she was recovered; **(b) Marchand had been in the respondent's employ for about 15 years**, she was admittedly an excellent employee, and the respondent was suffering from a serious labor shortage; **(c) Marchand was absent from**

work on two previous occasions, before she joined the Union; on one of these occasions she was away for 7 or 8 weeks; on neither occasion did the respondent take any disciplinary action against her; **(d) a few weeks prior to her discharge, Marchand made it clear to the respondent that she would continue to maintain her interest in the Union,** and approximately 2½ weeks before her discharge, she became an officer of the Union, of which the respondent had knowledge; **(e) the respondent's antipathy to the membership and activities of its employees in the Union"** (Tr. R. 164).

Without taking time and space to discuss these statements in detail, we can show quickly that, even assuming they were supported by the evidence (as, for the most part, they were not), they do not support the inference of discriminatory discharge. Marchand (and other employees in her department) joined the Union in August, 1942 (Tr. IV, 2740, 2756). Marchand immediately became an active Union adherent and on her own initiative (Tr. III, 1710) discussed her Union affiliation with the buyer of her department with whom she was on close personal terms. Thereafter, Marchand was given greater responsibility (Tr. IV, 3035, 3036) and she was given an increase in salary on September 26 (Tr. VI, 4438). She was never discharged but her name was removed from the payroll for unexplained absence (BX. 33, Tr. VII, 4800). One fact stands out in Marchand's own testimony; and it is unanswerable. Perhaps it was for this reason that it was omitted from the Board's findings. We refer to the fact that Marchand herself testified that on or about October 27, after she received a copy of the Respondent's notice to the Missouri Unemployment Compensation Commission that she had been taken off the payroll for unexplained absence, her husband, at her instance, spoke to the Petitioner's employment office about this notice and was told:

"there must have been some mistake, **tell your wife to come in just as soon as she is able to come back to work**" (Tr. III, 1733).

Notwithstanding this assurance of about October 27th (which would have been enough for anyone who wanted to work), Marchand waited over two weeks and then wrote a **registered letter** to McCarthy on November 12 in which she demanded to know her status and said, "I am most anxious to get back to work" (BX. 117, Tr. VII, 4801). On November 14 McCarthy replied to her by letter naming a specific time and place for an early appointment with him (BX. 118, Tr. VII, 4892). She failed to acknowledge the letter or keep the appointment. Her excuse for ignoring McCarthy's invitation that she thought "probably" her seniority would be taken away (Tr. III, 1740) was lame indeed, especially for anyone as anxious as she professed to be to go back to work, when she wrote McCarthy on November 12, "I am **most anxious** to get back to work."

It would have been unreasonable enough for the Board to have found a discriminatory discharge (and refusal to reinstate) in Marchand's case, if there had been only McCarthy's letter replying to Marchand's letter. But how the Board could have made its finding in the face of Marchand's own admission of the previous instructions to her husband that she should come back just as soon as she was able, is beyond understanding.

The above brief discussion of the facts in the Marchand case illustrates the importance of imposing reasonable restrictions upon the power of the Board to draw inferences and the necessity of making it clear to the reviewing Courts that they do have the power, as well as the duty, to review the facts to see whether or not they afford a legitimate basis for the inferences drawn. In the Marchand case the question for decision by the Board was whether or not the fact that Marchand did not return to

work for the Petitioner after her illness was because she was prevented from doing so by Petitioner on account of her Union activities. The undisputed facts shown by her own testimony are that when her absence was explained by her husband he was told that she should report to work as soon as she was able, and she received a second invitation from Superintendent McCarthy after she failed to take advantage of this first offer, both of which invitations she ignored. How can it be said that under these circumstances Marchand's failure to return to work was the result of Petitioner's general animosity towards the Union or was motivated in any way by any attitude of the Petitioner, when all the testimony is to the effect that the sole reason for Marchand's failure to return to work was her own refusal to do so? Not only does Marchand's own testimony show that the Company's attitude towards this Union or any of its members had **nothing** to do with the Marchand case, it shows that the Company had nothing to do with her failure to return to work, **regardless of motive**, for the reason that, according to her own testimony, she was invited to return, but stayed away on her own volition. The Marchand case illustrates the complete unreliability of the Board's explanation of the basis for its inferences as to motive.

The Court did not consider the facts of the various cases involved here, but placed them all in the same category and relied upon the Board's inference drawing power. And we believe that this demonstration of the unreliability of the inferences drawn by the Board as to the motive in the Marchand's case should be considered equally applicable in the other cases, as to which lack of space precludes a similar specific demonstration.

Unreliability of the Findings of Fact By the Board.

The deference accorded by the Courts to the conclusions and inferences drawn by the Board assumes that the primary findings of fact upon which the final inferences must be based, are consistent with the evidence; that they are fairly made; and that they do not contain errors which are either inexcusably careless or perhaps even the result of a studied design to support a preconceived notion.

As the Court said in the case of **N. L. R. B. v. Cherry Cotton Mills**, (CCA 5) 98 F. 2d 444, 446:

> "The very fact that the Board's findings of fact are to be generally conclusive but makes it more necessary that they may be made **with fairness** and according to the safeguards established by law."

The Board's findings of fact in this case, including those of the Trial Examiner adopted by the Board, are replete with errors. We cannot hope to demonstrate all these errors in this brief because the great number of them has made this impossible; nor can we hope to convince the Court merely by a few ordinary examples, that the entire factual basis of the Board's decision is defective. We do believe, however, that some of the errors of the Board are so inconsistent with the requirement of fairness that the very **nature** of these errors will be sufficient to convince the Court that the factual basis from which the Board undertook to draw its inferences, is unstable.

For example, the Trial Examiner made a finding that an announcement by Petitioner in **1942** of its sick leave plan for employees who were members of the **Welfare Association**

> "could not help but recall to the minds of the employees the respondent's statements in its leaflets of

> May and July, **1937**, wherein the respondent stated that it was not necessary for the employees to join a union because under the respondent's policy the employees enjoyed, among other things, sick benefits, hospital services, the Outing Club and other Welfare activities" (Tr. R. 279).

This finding is based upon BX. 8 (Tr. VII, 4772) which, while it uses the word welfare, under no stretch of the imagination uses the word in such a way that it could be identified with the **Welfare Association**, or would be likely to be so identified in the minds of the employees some five years later, as the Trial Examiner found. This error was not merely a careless use of a capital "W" in the Trial Examiner's report; it was a deliberate misuse of the word "welfare" in order to link the 1942 announcement with the 1937 leaflet for the purpose of creating an inference unfavorable to Petitioner; and it, with the many similar instances contained in the record, destroys any presumption of fairness which might otherwise be attached to the Board's processes or fact findings. Such errors are not consistent with fairness; and inferences drawn from findings of fact so distorted and intentionally erroneous are completely unjustified. These wilful errors were pointed out in detail below. Since each requires some showing of the surrounding circumstances, they cannot be cataloged here but we can point out only typical instances.

Another unquestionably intentional error was the finding by the Trial Examiner to which attention was unavailingly called in Petitioner's Exceptions (Tr. R. 67), that "**Hansen does not smoke**" (Tr. R, 196, note 45). Hansen and Leonard were discharged for loafing and smoking, but were reinstated pursuant to the settlement of September 14, 1942. Naturally if Hansen did not smoke, it would be quite conclusive evidence that he was not smoking at the time in question, and his discharge for smoking would indicate

that there was another motive for his discharge than that assigned. In order to indicate the presence of another motive, the Trial Examiner gratuitously found that **"Hansen does not smoke"**. This finding was not merely a careless mistake, in view of the fact that it was testified repeatedly that **Hansen does smoke** (Tr. I, 367, 368, 433, 434, 435), and there was no testimony at any place in the record that he did **not** smoke. **The Trial Examiner even read into the record at one point the previous testimony that "Ray Hansen was smoking"** (Tr. I, 433), which makes it all the more clear that the Trial Examiner knowingly made the erroneous finding that "Hansen does not smoke" in order to create an unfavorable inference against Petitioner.

How can inferences be sound if they are based on findings of primary facts which are in part—to say the least—deliberately unfair? And when a lack of reliability is shown in part of the findings, is not confidence in the entire fabric destroyed?

CONCLUSION.

We believe that this case presents an important question of Federal law, which is of wide public interest, and which should be decided by this Court, as to the validity of a rule against solicitation in a retail department store, and as to the power and jurisdiction of the Board to substitute an arbitrary and unworkable rule for the rule which has been traditionally adopted and enforced in all retail department stores.

We believe that the statutory provision that the findings of fact by the Board may not be set aside by the reviewing Court "if supported by evidence", has been used in conjunction with the extension of the Board's power of inference in this case in such a manner as to make a mockery of the constitutional provision guaranteeing litigants

equal protection under the law, and due process of law. If the technique utilized by the Board in this case is approved and the decision of the Court below allowed to stand, it will mean that the Courts will have abrogated completely any right of review of decisions of the National Labor Relations Board, either as to the facts or law; that employers will have no means even of knowing the facts which the Court believed to sustain the orders of the Board; that a premium will have been placed upon the multiplicity of the Board's errors and the unreliability of its trial examiners; that the Board may with impunity fail to correct even the most deliberate errors of its trial examiners; that the Courts may refuse to pass on the issues presented to them in cases involving the National Labor Relations Act in any case where an employer has ever been found to have expressed antagonism to a union or unions; and that the National Labor Relations Board and its trial examiners and other employees will be given a free hand, subject to no limitations whatever, to file such charges as they may see fit and to decide them as they may see fit, secure in the knowledge that the Board's power to draw inferences is sufficiently broad that their conclusions will receive rubber stamp approval by the Courts.

We do not believe that it was the intent of Congress in granting broad powers to the Board, and much discretion, to provide that the findings of the Board shall be treated with such complete deference by the Courts, especially in cases where the Board has not exercised its power with complete fairness and accuracy, or that Petitioner's efforts to demonstrate this to the Court should be brushed aside with the remark that Petitioner does not realize the broad scope of the Board's power to draw inferences.

It is respectfully submitted that this case should be reviewed by this Court. The Court below has decided

important questions of federal law which have not been, but should be, settled by this Court, and the decision of the Court below is in conflict with applicable decisions of this Court, and is in conflict with decisions of other Circuit Courts of Appeals on the same matter.

Respectfully submitted,

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APPENDIX.

ANALYSIS OF FRANK'S TESTIMONY CONCERNING THE ALLEGED GILLEY SOLICITATION, SHOWING IT TO BE VAGUE, INCOHERENT AND EVASIVE, IN ADDITION TO BEING HEARSAY.

Alleged Knowledge of Petitioner That Gilley Was Violating Its Rule.

The Board found that, "Gilley **openly** solicited memberships for the A. F. of L. in various departments of the store during working hours" (Tr. R. 153).

Frank testified that he reported at C. I. O. headquarters that Gilley had been soliciting, to Shein, Boggs and the Master Committee, on at least ten occasions but made no complaint or report of it at the store (Tr. IV, 2955).

In attempting to answer the unasked but obvious question, why, if Gilley had been soliciting to that extent, it had not been reported to the Petitioner **either by** Frank or the C. I. O., Frank testified to the **conclusion** that

> "it was **openly obvious** over there, because as I stated before, she wore a button and I know that circular came out on her, the 'Famous-Sayings'" (Tr. IV, 2955).

In answer to the question as to the basis of his statement that "it was openly obvious she was soliciting in the store," he testified:

> "A. No, the basis I made that statement on that it was openly obvious she was soliciting, **it came out** in the statement of 'Famous Sayings' she was **for** the A. F. of L. organization.
>
> Q. That testimony you have just given is the basis

of your statement that it was openly obvious she was soliciting?

A. Yes"[1] (Tr. IV, 2956).

This testimony does not support a finding of open solicitation—or of **any** solicitation.

Frank had previously testified that so far as he knew Gilley's solicitation activities had not come to the attention of management (Tr. IV, 2936), but (after a recess [Tr. IV, 2954]) the Board's attorney returned to the question of showing Petitioner's knowledge of the alleged Gilley solicitations, by the following rather suggestive questions:

"Q. Do you **know** whether any of the buyers, assistant buyers or **supervisors** of your department were **around** when Gilley made any of these solicitations? Were you **informed** as to that by any of the employees?

A. I **think** Mr. Levy knew about it.

Q. How do you **know** Mr. Levy knew about it?

A. Because I spoke to Mr. Levy about it.

Q. What did you tell him?

A. I told Mr. Levy, 'Miss Gilley is making solicitation **in the department** for the A. F. of L.' (But see Tr. IV, 2965.)

Q. What did Levy say?

A. I **think** Mr. Levy said, 'I know it.'[2]

Q. You told him that, **anyhow**?

A. I told him that, yes, sir.

Q. A moment ago Mr. Tucker asked you if you told anybody in authority about that solicitation, and I believe your answer was no.

A. I did not do it in a matter of reporting it. Mr. Levy used to come over and talk to me and read these circulars (Tr. IV, 2959).

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1 Here is a specific admission that the the basis of Frank's conclusion (that it was openly obvious that she was soliciting) was the facts stated in the C. I. O. circular (BX. 192, Tr. VII, 4827, 9), which it was stipulated was not offered as proof of the fact that she was soliciting and which, as a matter of fact, simply contained the question, "Was she afraid of getting fired for soliciting on store time?" "No, there is no danger if one solicits for the 'right' organization" (Tr. IV, 2956).

2 The Board omitted the qualification "I think" in its finding and found that "Levy merely replied 'I know it'" (Tr. R. 154, Note 13).

Trial Examiner Myers: What circulars?

A. That the C. I. O. put out. Occasionally Mr. Levy would come over and speak to me about it.

By Mr. Hackler:

Q. Was this just a personal conversation?

A. Yes, sir, it **wasn't** a matter of reporting Miss Gilley at all" (Tr. IV, 2960).

The witness testified as to the date of that conversation as follows:

"Q. Just give us now the time when that conversation took place.

A. Well, it **would have to have taken place**——

Q. When did it take place?

A. **I don't know.**

Trial Examiner Myers: When do you **think** it took place?

A. I would say it took place some time—I don't know whether it was the latter part of last year, in December, or maybe January of this year. **I don't know.**

Trial Examiner Myers: Somewhere around there?

A. Yes, sir (Tr. IV, 2963).

Q. **Give us**, then, **the conversation** that took place between you and Mr. Levy.

A. I do not **recall**, for the simple reason I have had innumerable——

Trial Examiner Myers: Will you tell us what you do recall?

A. We were talking about a circular, and in the discussion——

By Mr. Tucker:

Q. Do you remember what circular?

A. No, I don't, for we discussed quite a few, and which ones they were and what we discussed, I don't know. If the subject came up and refreshed my memory, I would know.

Q. Would it be the circular in which Miss Gilley's cartoon appeared?

A. I do not think that one more than any other.

Q. Some particular circular was the basis of your conversation with Mr. Levy?

A. Not **all of the time,** no sir.

Trial Examiner Myers: He is talking about this particular one. **Will you listen to the question?**

A. I am trying to understand what he is saying.

Trial Examiner Myers: Listen to the questions. Will the Reporter please read the question?

(Question read by the Reporter.)

A. Some particular circular, yes.

By Mr. Tucker:

Q. And you do not remember which one?

A. I do not.

Q. And do you remember the subject matter of the circular?

A. I do not.

Q. All you remember was it was a C. I. O. circular?

A. That is right (Tr. IV, 2964).

Q. And you are sure it wasn't an A. F. of L. circular?

A. I have had no discussion with Mr. Levy, I believe, on an A. F. of L. circular.

Q. And are you positive this particular conversation you have in your mind was not based upon the A. F. of L. circular?

A. I would not say I am positive of that. It may have been that one and may have been any one of our own.

Q. At any rate, you had a conversation with Mr. Levy. What was the conversation?

A. During the conversation we had discussed the circular we were discussing at the time, and I mentioned to Mr. Levy, 'Miss Gilley is openly soliciting here, **not only here but other departments of the store.'**

(But note that he had just before testified he told Levy, 'Miss Gilley is making solicitation **in the department** [Tr. IV, 2959].)

Q. **Did you give that to him as a complaint?**

A. **I did not.**

Q. It just came out in the course of the conversation?

A. Yes, sir.

Q. **Did you make it to him in such a way he should take any action on it?**

A. **No, sir.**

Mr. Hackler: That is objected to as calling for a conclusion.

Trial Examiner Myers: Overruled.

By Mr. Tucker.

Q. **Did you ask him to take any action.**

A. **I did not.**

Q. **Did you expect him to take any action on it?**

A. **I did not"** (Tr. IV, 2965).

It is only by taking the most favorable of Frank's answers, which was the very weak and reluctant, "I think Mr. Levy said, 'I know it,' " and distorting it into—"Levy merely replied, 'I know it,' " that the Board has any excuse for finding that even an assistant buyer had any knowledge that Gilley was soliciting. From this the Board draws the unjustified inference that the **Petitioner knew** that Gilley had solicited on store time and property (although even Frank does not go so far as to ascribe such an admission to assistant buyer Levy). And from Frank's own testimony he did not mention the matter to Levy in such a way as to ask, or expect him to do anything about it.

Frank's General Testimony on Solicitation.

The general attitude of this witness was that of a willingness to testify to damaging generalities, without being willing to be cross-examined on details. This is typified by the following:

"Q. What was **the conversation** that was reported to you **by Stock?**

A. The **general run** of the conversation——

Q. I do not want the general run.

A. **You certainly do not expect me to remember** the conversations which took place six or seven months ago or three months ago.

Trial Examiner Myers: Just tell what you remember **without bringing in your conclusions.**

A. The only thing I can say with any truthfulness is **any** time she solicited **any of them,** other employees of the department—not all of them but **many** of the employees of the department, **most** of them would come to me and tell me of that particular occasion. **What they would say is, 'Gilley was trying to get me to join the union again today.'** That is the sum and substance of their conversation.

Q. You mean that is **all** that was said?

A. **That is all.**

Q. That is all you can remember that was said by any of these people reporting to you?

A. **Unless** she made the statement——

Q. Is that right?

A. Yes, that is correct.

Trial Examiner Myers: Unless what?

A. Unless she **would have told** one of them that the 'A. F. of L. is going to come into the store and you better join the organization.' That would also come back to me at the time the person told me she had again solicited him or her (Tr. IV, 2937).

By Mr. Tucker:

Q. Do you recall now in some of these cases such statement was reported to you as having been made by Gilley.

A. In what particular conversation or which person it was I would not know.

Q. Was there anything else that was reported to you by any of the seven people you have named specifically or by any other persons whose names you do not now recall who complained to you or stated to you Gilley had solicited them—**was there anything else said about that solicitation other than what you have stated?**

A. **Not regarding the solicitation.**

Q. **Did any of them give you any further details as to the nature and extent of the solicitation?**

A. **They did not.**

Q. **And the substance of it is that certain of them said Gilley had been trying to get them to join the A. F. of L. again?**

A. **That is right.**

Trial Examiner Myers: Where did these people tell this?

A. In the department.

Trial Examiner Myers: Did they say **when** Gilley was over to see them?

A. Yes, sir.

Trial Examiner Myers: When?

A. During the day.

Trial Examiner Myers: They said that each and every time?

A. No, they did not, Mr. Examiner, for I did not ask them each and every time.

Trial Examiner Myers: How many times did they tell you that?

A. I would say fifty per cent of the time.[3]

Trial Examiner Myers: Gilley had approached them and solicited them in the store?

A. That is correct (Tr. IV, 2938).

Trial Examiner Myers: During working hours?

A. **That is correct.**

Trial Examiner Myers: They said that?

A. **Yes, sir.**

Trial Examiner Myers: All right."

The witness testified:

Q. Just what would you ask?

A. **I would ask, 'Did she approach you on store time while you were working in the department?'** and they would say yes. They often wondered why she had not been reported, why someone had not reported her (Tr. R. 2939). (But see Tr. IV, 2943, for contradiction.)

* * * * * *

Q. Now when you say in your conversation with these seven people—I might ask you this. Are the conversations you testified about with these seven people the same kind of conversations you had with

[3] Note that the leading and suggestive questions of the Trial Examiner immediately following only required the witness to follow the line indicated by the Trial Examiner and to say "That is correct" and "Yes, sir." Later Frank admitted his 50% figure was conjecture (Tr. IV, 2940).

others whose names you do not recall? 'that would all run along the same line?'

A. They would all run along the same line, yes (Tr. IV, 2940).

* * * * * *

A. * * * Upon one occasion I do recall him saying, 'She just solicited me a few moments ago,' or possibly a half hour ago. They did not immediately run over and report that. That is not necessary. They may be solicited in the morning and tell me two days later.

Mr. Tucker: I move that entire answer be stricken out.

Trial Examiner Myers: Motion denied (Tr. IV, 2942).

By Mr. Tucker:

Q. Will you tell me what Mr. Jackson said to you upon the first occasion when he was solicited and what you said to him, as much of the conversation as you can remember?

A. **Just** that he had been solicited by Miss Gilley to join the A. F. of L.

Q. And what did you say?

A. I do not know whether I said anything. (See Tr. IV, 2939 for contradiction.)

Q. Do you recall saying anything?

A. I do not recall **saying anything.**[4]

Q. Do you recall anything else about that conversation?

A. I do not.

Q. And now, what about the second conversation?

A. The **chances are** the second one——

Q. Not 'The chances are.'

A. The second was the same thing.

Trial Examiner Myers: **Now, Mr. Witness,** you just tell us everything you remember and **don't try to say, 'the chances are'** or anything like that, or **'I believe.'** If you do not remember, say it might have been something else and might not have been and you do not know. Tell us what you **do know.**

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4 Note that this very specific testimony is inconsistent with Frank's generalities that **he had asked** the employees whether or not Gilley had solicited them on company time and property and that they had replied in the affirmative (Tr. IV, 2939).

A. The only way I can answer that truthfully, give a truthful answer to Mr. Tucker's question is to say the first time he said he was solicited or the second time I asked 'Was that here in the department?' and he said, yes.

By Mr. Tucker:

Q. Did he say when?

A. No.

Q. **Did you ask** him when?

A. No" (Tr. IV, 2943).[5]

The Seven Alleged (Hearsay) Instances of Solicitation by Gilley.

Frank testified that he remembered specifically that Jackson, Stock, Janechek, Blanke, Glaser, Lemcovitz, Heisele had **told him** that Gilley had solicited them on store time and property (Tr. IV, 2932). There was no corroboration of this hearsay testimony, which was the sole basis for the Board's vital finding of discriminatory enforcement of the rule against the C. I. O. and in favor of the A. F. of L.

Moreover on going into the details of these reported solicitations in each instance to determine what was allegedly reported by the individual said to have been solicited, it will be seen that the details of Frank's hearsay testimony did not bear out his general statements.

Jackson.

As to the alleged **Jackson** solicitation, Frank testified that:

"A. **Oh, if I can remember the** conversation, **possibly** he said, 'For **some reason** she was over here again try-

[5] Note that even this does not support a finding of solicitation on company time, in view of the fact that employees had two rest periods each day and shopping time. Note also that this specific testimony contradicts Frank's earlier testimony (Tr. IV, 2939) in which he said, "I would ask 'Did she approach you on **store time while you were working** in the department?' and they would say yes."

This analysis shows that the Trial Examiner and the Board not only relied upon uncorroborated hearsay, but ignored the witness's self-contradictions and utilized only the answers of the witness which were the most favorable to the Board.

ing to get me to join the A. F. of L.' That is **usually** what **they will** say. **If** it is a member, **they** will tell me what it was.

Q. What was said so far as you recall the conversation of Jackson.

A. **That's about all**" (Tr. IV, 2936).

He then testified that he thought there had been **two** solicitations of Jackson by Gilley, and testified as follows:

"Q. In the second report, was that the specific statement made to you, that the solicitation had been there in the store?

A. The first time I don't recall whether it was or not, **I assume** it would be.

Q. I do not want your assumption, I want your recollection.

A. I will say **I don't know on the first time.** I do know on the second.

Q. Just what was the conversation reported to you on the second occasion? (Tr. IV, 2936).

A. On the second occasion just that Miss Gilley had been over there to again request him to join the A. F. of L.

Q. Where does Jackson work?

A. In the Men's Furnishing Department.

Q. And he told you Gilley had come over again to ask him to join the A. F. of L.?

A. That's right.

Q. And did he say she had come over to his Department to ask that, or said she had come over again?

A. Had come over again.

Q. **He did not say whether to his department?**

A. **No, he did not say that**" (Tr. IV, 2937).

After some generalities in which the **Trial Examiner led the witness into giving hearsay** answers to leading questions as to whether Gilley had solicited "in the store" "during working hours" (Tr. IV, 2938, 9), the following testimony was given concerning the alleged Jackson solicitation:

"Q. And what were those conversations?

A. The only thing I can remember about them would be that he came over to me or called me as I was passing by and stated Miss Gilley again tried to solicit him, or had tried to solicit him.[6]

* * * * * * *

Q. And what did he say to you the first time?

A. That he had been solicited by Miss Gilley."

Q. Is that all?

A. If you have reference to on store time or store property, he did not meet the girl outside[7]" (Tr. IV, 2942).

There is nothing in the hearsay testimony of Frank as to the alleged solicitation of Jackson, which would support a finding that he was solicited on store time and property.

Stock.

The following is the relevant testimony as to alleged solicitation of **Stock**:

"Q. Now, then, what about your conversation with Stock?

A. I don't know.

Q. Do you remember anything about the conversation?

A. No individual conversation I had, **for they would all run the same way.**[8]

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6 Here again the reluctance of the witness to answer specific questions is evidenced. The witness testified: "I made the statement a moment ago, Mr. Examiner, when you interrupted me, that I did not know how I could be expected to remember a hundred conversations I have had from time to time down there. **It is impossible for me to truthfully testify to anything like that**" (Tr. IV, 2942). The previous statement was: "You certainly do not expect me to remember the conversations which took place six or seven months ago or three months ago" (Tr. IV, 2937).

7 Note the consciousness of the witness of the importance of this question and at the same time the evasiveness in failing to meet the question squarely, and in giving an evasive answer. A short while before, when the witness was reminded that in his original testimony he had not stated that the persons alleged to have been solicited had said that the solicitation had taken place on store time and property, the witness significantly stated, "The **Examiner** asked me that question" (Tr. IV, 2939).

8 Note here again the eagerness to generalize.

Q. I want to know about Stock now, whether you remember anything about that?

A. I do not.

Q. You do not remember how many conversations you had with Stock?

A. No (Tr. IV, 2943).

Q. Or how many times he reported?

A. I can recall one time. I believe Walter said to me, Mr. Stock—'there should be a stop put to that' if I recall correctly, and that is about as much as I can remember.

Q. What did you say to him in reply?

A. I said, 'Yes, there should be.'

Q. Is that all the conversation?

A. All I can recall, yes.

Q. Tell us what the conversation was with Mr. Stock?

A. I just told you.

Trial Examiner Myers: There must have been something before that remark was made.[9]

A. The only way the conversation would have come up at all would be if I passed him and he had stopped me or I stopped him and asked, 'Has Miss Gilley been over again?' or he stopped me and said, 'She came over and solicited me.'

By Mr. Tucker:

Q. Do you remember any conversation with Mr. Stock at all?

A. Just what I testified, where that he did say to me at one time, 'There ought to be a stop put to her.'

Q. You do not remember the rest of the conversation?

A. I do not.

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[9] Here the impatience and disgust of the Trial Examiner with the witness' evasiveness was so pronounced as to belie the Trial Examiner's finding that Frank was a credible witness. The opportunity which the Trial Examiner had to observe the demeanor of the witness on the stand, which is supposed to give the Trial Examiner such an advantage over the Court in determining the credibility of the witness, does not preclude the Court from evaluating the Trial Examiner's finding in the light of the Trial Examiner's own demeanor as evidenced towards the witness and his credibility during the actual progress of the hearing, rather than weeks or months later when the Trial Examiner was writing his report, apparently oblivious to his own recorded feelings when the witness was testifying.

Trial Examiner Myers: What was the conversation about?

A. When he told me she had been over to solicit him, or he had seen her solicit other people in the department.

By Mr. Tucker:

Q. Do you remember which it was?

A. No, I don't know, offhand.

Q. Do you remember what the conversation was?

A. I do not.

Q. The only thing you remember specifically is he said, 'There ought to be a stop put to it,' and you agreed with him?

A. That is right.

Q. You do not remember any opening conversation preceding or following this?

A. That is right (Tr. IV, 2944).

Trial Examiner Myers: What was the conversation about, walking around barefooted?

A. No, about solicitation.

Trial Examiner Myers: Tell us how it started and everything you talked about. When Mr. Tucker asked what you remembered about it, you said he said there ought to be a stop put to it. A stop to what?

A. To the union solicitation.

Trial Examiner Myers: Give the conversation——

A. That is what I have tried to do.

Trial Examiner Myers: Tell us now. Tell us what you remember of the conversation.[1]

A. Of the conversation with Mr. Stock?

By Mr. Tucker:

Q. Yes.

A. The conversation with Mr. Stock was to the effect

[1] Here it is obvious that, although the witness could remember nothing more than what he had testified to, the Trial Examiner was not satisfied and was trying to get the witness to say something more.

Miss Gilley was soliciting for the A. F. of L. **on store time** and that there should be a stop put to it.[2]

Q. Do you remember saying that, or having Mr. Stock say it?

A. I remember Mr. Stock saying it, yes.

Q. Do you remember now Mr. Stock said to you Gilley was soliciting on **store time or store property, or both?**

A. Mr. Stock said to me, and it is general knowledge in the department down there of everyone. **I could not remember those conversations by any one of the people, but they could be brought here to testify to those statements.**[3]

Q. Confine your answer to the question.

A. I say **the employees can answer the questions about what I remember about those particular conversations.** There is no way in the world I would know except from little items that might stick in my mind.[4]

Q. I ask what the items are that stick in your mind as to Mr. Stock?

A. I have told you.

Q. Start over again and get it clear, and state the conversation as you remember it (Tr. IV, 2945).

A. He made the statement Miss Gilley was solicit-

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2 Here the Trial Examiner finally succeeded in getting this witness to include the words "on store time." This was an element which the Trial Examiner had previously suggested to the witness (Tr. IV, 2938), as the witness acknowledged (Tr. IV, 2939) by saying "The Examiner asked me that question," and it seems perfectly obvious that the witness finally associated the Examiner's persistent questioning as an indication that he should include in his testimony as to the "effect" of the hearsay report of the solicitation, that it was "on store time."

3 Note here that the witness refused to answer the specific question as to whether or not Gilley was soliciting on store time or property or both, and that he avoided the question by saying "that it was general knowledge," and he further branded his testimony as worthless by stating that "he could not remember those conversations"; and he showed the absurdity and the lack of excuse or justification for relying on the vague and obscure testimony, which the witness said more than once he could not remember, by stating that the persons who had reported the solicitations "could be brought to testify to those statements"—which significantly they were not.

4 Here again the witness refused to answer the specific question as to what Stock had said and gave the Board an unintentional though graphic lecture on the proper procedure for establishing the facts by his statement, "**The employees can answer the questions** about what I remember about those particular conversations."

ing **on the floor** again, and there should be a stop put to it.[5] I agreed, and that is **all** that was said.

Q. How many such conversations did you have with Stock?

A. I don't know.

Q. And you do not remember when?

A. That is right.

Q. And you do not remember whether you went to Stock or Stock came to you?

A. I do not.

Trial Examiner Myers: Between what times was it?

A. During working hours.

Trial Examiner Myers: I mean between 1940 and 1941?

A. I would say it was say **from last June on,** when we started discussing—in fact even before that time we started discussing unionism.

Trial Examiner Myers: That she was soliciting for the A. F. of L.?[6]

A. No, sir.

Trial Examiner Myers: That is what we are talking about.

A. From the time she joined the organization and wore the button on the floor" (Tr. IV, 2946).

Here again there is not even a hearsay basis for a finding of solicitation on store time and property.

Janechek.

The only relevant testimony on Janechek is as follows:

"Q. What about Janechek? What conversation did you have with Janechek?

A. I have told you Miss Janechek at least once in

[5] Note here that the witness again refused to state that it had even been reported to him that Gilley was soliciting "on store time."

[6] Here the witness, in his eagerness to try and make the point that Gilley's solicitation was reported to have been during working hours (if not on store time), has gotten into a dilemma of testifying that Gilley was soliciting for the A. F. of L. even while she was a member of the Master Committee for the C. I. O. and before she changed her affiliations. Note the Trial Examiner's reminder as a result of which his witness corrected his error.

passing her Glove Counter she **would** call me over or I would stop by and say 'How are you, Irene?' I would say, 'Anything new?' She **might** say, 'Miss Gilley came over, and I told her I did not want to have anything to do with it. She wanted to solicit for the A. F. of L.' And she said, 'I don't want anything to do with it.'

Q. What did she say Gilley said to her?

A. Wanted her to join the A. F. of L.

Q. Did she say what Gilley said?

A. No, she did not say, or if she did I do not recall.

Q. Did she say what she told Gilley?

A. She said she did not want to join.

Q. And **did she say when** the conversation took place?

A. Would you repeat that question, please?

Trial Examiner Myers: Read the question.

(Question read by the Reporter.)

A. **No, she did not.**

By Mr. Tucker:

Q. Or **what time of the day it was?**

A. **No,** she did not.

Q. How many such conversations did you have with Janechek?

A. I would say two or three.

Q. And were all of them to the same effect?

A. All along the same line; yes, sir'' (Tr. IV, 2947).

The witness himself testified that Janechek did not say what Gilley had said, or when the conversation took place; so that there is no basis even in Frank's hearsay for the finding that Janechek was solicited on company time **or** property.

Blanke.

The only portions of the testimony that might conceivably be relevant on the question of the alleged Blanke solicitation are as follows:

"Q. You say he reported to you on one occasion she had asked him to join; is that right?

A. That is right.

Q. Did he use the word 'solicit'?

A. I don't recall.

Q. Do you remember whether he did or not?

A. I don't know, Mr. Tucker.

Q. What did he say?

A. To the best of my knowledge, he said, 'She asked me to join the A. F. of L.,' and that is all.

Q. Did he say when she had asked him to join?

A. **No, sir.**

Trial Examiner Myers: When we say 'when' we do not mean just the day or week or a year or an hour. Did he say when she was **over to him,** or where she met him, and **things like that?**[7]

A. Not in Mr. Blanke's case" (Tr. IV, 2948).

Glaser.

The testimony as to the Glaser solicitation contained the additional element of double hearsay. All the relevant testimony as to the alleged Gilley solicitation is as follows:

"Q. How about Glaser?

A. In Glaser's case, Mr. **Lemcovitz,** who works right with Mr. Glaser in the Pajama Department, **told me** Miss Gilley had approached Mr. **Glaser** and aggravated him to the point he became quite angry at her, about joining the A. F. of L. I asked him at that time, 'Is Louie mad'? and he said, 'Yes, he is pretty hot.' I said to Lemp, 'Has she asked you, too?' and he said yes, and **that is all of that.**

Q. Did Glaser ever tell you Miss Gilley had asked him——

A. I asked—I walked over to Louis after that some time during the day and said, 'What is the matter, Louis, did she ask you, too?' and he said yes.

Q. Then it is your testimony Mr. Glaser said to you she had asked him to join?

[7] Apparently the Trial Examiner was trying, unsuccessfully, to bolster up the witness as to Blanke, by suggesting by his question and the use of the words "over to him" that the solicitation was on company time and property.

A. Yes.

Q. What was the conversation you had with Mr. Glaser?

A. I just told you that, Mr. Tucker. I went to him and asked 'Lemp tells me Gilley has been bothering you, Louis,' and he said, 'Yes, she is after me again,' or something to that effect.

Q. **Is that all that was said?**

A. **Yes, sir"** (Tr. IV, 2949).

The witness testified that this was all that was said. This should have been the end of the testimony, but the Trial Examiner, who was more than a hearing officer in this case, was not satisfied. After the Trial Examiner's prompting, the following testimony was given:

"Trial Examiner Myers: What does all that refer to?

A. To joining the A. F. of L.

Trial Examiner Myers: How do we know? What was **said** about the A. F. of L.?

A. Mr. Glaser told me Miss Gilley had approached him and **asked him to join the A. F. of L.** They work right together, Mr. Exaimner (Tr. IV, 2949).

By Mr. Tucker:

Q. Is that what Mr. Glaser said to you, she approached him and asked him to join the A. F. of L.?

A. Yes, sir.

Q. Was it the other way you testified a while ago?

A. It is still the same way I testified a while ago and now. First Mr. Lemcovitz came over to me and told me and I went to Louis. The testimony is not changed.

Q. What is the conversation you had with Louis Glaser?

A. The conversation is this: I walked over and asked Louis, 'Lemp tells me Gilley has been after you again,' or **something to that effect.** He said, 'Yes, she asked me to join,' **something like that.**

Q. Did she—A. F. of L., or was **that used at all?**

A. That is not necessary for us to use down there; it is understood.[8]

Q. Did Glaser tell you **anything** about the circumstances of the invitation that Gilley extended to him to join the A. F. of L.?

A. No, I did not go into it, for it **wasn't important.**

Q. He did not say when or where or how?

A. That was right there in the store, yes, definitely.

Q. Did he say that?

A. Yes, he said that.

Q. It was not in that conversation, was it?

A. Not **necessarily**, at that time.

* * * * * * *

Q. You had **more than one** conversation with Mr. Glaser?

A. A lot of them.

Q. On the subject of being solicited by Gilley?

A. **No** (Tr. IV, 2950).

By Mr. Tucker:

Q. What are the circumstances?

A. In what respect?

Q. About finding out that the solicitation of Glaser took place on the floor. Did Glaser tell you that?

A. Yes, but I don't recall whether at that time or at a later date.

Q. Do you recall now whether you had one or more conversations with Glaser on the subject of being solicited by Gilley?

A. I do not.

Trial Examiner Myers: If he told you at that time, that would be one conversation. If he told you at another time, there would be two conversations, wouldn't there?[9]

---

8 This answer can only be construed as a denial that Glaser is reputed to have used the words "A. F. of L."; but this is in express contradiction to the answer just given to the Trial Examiner in response to his overzealous leading and suggestive questions, "What was said about the A. F. of L.," and in contradiction to the witness' statement in response to the question of the Petitioner's counsel.

9 Here again the Examiner's exasperation at the witness' shiftiness and evasiveness over such a simple thing as to whether or not he had one or two conversations on the subject, is apparent.

A. I see what you are bringing out. Then there would have to be two.

Trial Examiner Myers: How many conversations did you have?

A. If I went back to Glaser at a later date, if it was not in that conversation—I probably asked Louie 'Did she do this on company time?' and he said, yes. I know the statement was made to me, but how it was I do not recall [1] (Tr. IV, 2951).

By Mr. Tucker:

Q. Do you recall having a conversation with Louie Glaser in which you asked him whether this solicitation by Gilley was on company time?

A. I am trying to get into my mind when Lemp came over to me. I can't quite figure out whether it was a second time. If it was a second time or not—but I do know one thing, Mr. Lemcovitz—Mr. Glaser told me this took place right there in the store.[2]

Q. You do not remember the circumstances under which Glaser told you that?

A. No, I don't. It would have to be there in the store. It could not have taken place anywhere else"[3] (Tr. IV, 2951).

There is certainly no basis for a finding that Gilley solicited Glazer on Company time and property.

Lemcovitz.

The following is all the relevant testimony as to the alleged Lemcovitz solicitation:

"Q. Now, about Mr. Lemcovitz. How many conversations did you have with him on the subject of being solicited by Gilley?

1 Here again note the Trial Examiner's obvious skepticism and the witness' evasiveness and the purely conjectural nature of his response, which included in the same sentence two "ifs" and a "probably."

2 Here, when faced with the specific question, the witness could not bring himself to say in plain English that Glaser had told him that he had been solicited "on company time." The best the witness could do was to say that it was "right there in the store."

3 Even Frank's testimony that Glaser told him that the solicitation took place "in the store" is predicated upon the witness' conclusion that "it would have to be there in the store as it could not have taken place anywhere else."

A. I do not recall that either, except the statement I mentioned about him coming over and telling me about Louis and answering him at that time and saying, 'Did she ask you that?' and he said——

Trial Examiner Myers: Did he say he overheard the conversation Glaser had with Gilley?

A. Yes, they were together.

Trial Examiner Myers: The three of them were together?

A. Glaser and Lemcovitz worked right there together, and I presume——

Trial Examiner Myers: I do not care what you presume.[4]

A. Yes, sir, right there and told me.

Trial Examiner Myers: Did he ever say he overheard the conversation between Glaser——

A. Glaser and Miss Gilley.

Trial Examiner Myers: He told you that?

A. That is correct.

Trial Examiner Myers: Did he say where they were?

A. He did not say that, but if that had not been right there in the department, he would not have overheard it[5] I asked him, 'Did this just take place?' and he said, 'Yes.'

By Mr. Tucker:

Q. You asked what?

A. I asked if it had just taken place when he came over and he said a little while ago (Tr. IV, 2952).

Q. Did he say how long ago?

A. He did not say.

Q. Lemcovitz came over and told about it?

A. He did.

Q. Did he say he had been solicited?

A. I asked if he had been.

Q. What did he say?

A. Yes.

---

[4] Here again the Trial Examiner could not restrain his aggravation and his obvious dissatisfaction with the fact that the witness was willing to testify that Lemcovitz overheard Gilley soliciting Glaser, based on the presumption that he must have done so because Lemcovitz and Glaser worked in the same department.

[5] It is obvious that the witness was testifying to a remote conjecture.

Q. Did he tell you **any more** about the solicitation?

A. **No.**

Q. Or **when** it took place?

A. He did not say.

Q. Or **where?**

A. **No**, sir.

Q. Or how recently?

A. **I don't recall.**

Trial Examiner Myers: What is the **use** of saying that **now?** You just said the man came over and said Gilley was over again and talked to the two of them, didn't you? What do you say you do not know **where** or **when** or **what for?**

A. I did not understand what Mr. Tucker was **driving at.**[6]

By Mr. Tucker:

Q. He said she became insistent upon the solicitation?

A. Yes.

Q. And was there any **further discussion** of what he meant by that, or what she had done on becoming insistent?

A. **No.**

Q. How many times did Lemcovitz say he had been solicited by Gilley?

A. How many times what?

Q. How many times did Lemcovitz say he had been solicited by Gilley? (Tr. IV, 2953).

A. I don't know. I know of this one particular time and that is all.

Q. You do not recall any other occasion when he came and spoke to you about it, or you spoke to him about other instances?

A. I do not recall, no'' (Tr. IV, 2954).

---

6 The Trial Examiner's disbelief of the witness and his utter unreliability stand out in stark contrast to the Trial Examiner's finding that the witness is credible. And the witness' lame explanation that he "did not understand what Mr. Tucker was driving at" is, to say the least, amazing because the questions were perfectly plain and understandable and it was not a question of what "Mr. Tucker was driving at," but of what the facts were (Tr. IV, 2953).

There is nothing in the testimony of Frank as to Lemcovitz which would sustain the finding that he was solicited by Gilley on Company time and property.

Heisele.

The following is all of the testimony about the alleged Heisele solicitation.

> "Q. How about Heisele? What circumstances or information came to you or to your attention about the solicitation of Heisele?
>
> A. I talked to Miss Heisele one day and she mentioned Miss Gilley tried to solicit her to join the A. F. of L.
>
> Q. Anything else in the conversation?
>
> A. No, I don't recall. It would be a matter of believing something or other and **I had better be still about it.**
>
> Q. You do not remember but one such conversation with Heisele?
>
> A. That is **about** all.
>
> Q. Remember when it was?
>
> A. No, I don't.
>
> Q. And nothing further of the conversation except what you testified
>
> A. That is right" (Tr. IV, 2954).

There is certainly nothing in the above testimony about Heisele even to substantiate the hearsay story that Heisele had been solicited to join the A. F. of L. on store time and property.

Statements by the Trial Examiner During Frank's Testimony Reflecting on Frank's Credibility.

The following comments by the Trial Examiner during only the portion of Frank's examination dealing with the alleged Gilley solicitation, are inconsistent with the Examiner's finding of credibility:

> "Just tell what you remember **without bringing in your conclusions**" (Tr. IV, 2937).

"Now, Mr. Witness, you just tell us everything you remember and **don't try to say, 'the chances are' or anything like that or 'I believe.'** If you do not remember, say it might have been something else and might not have been and you do not know. Tell us what you do know" (Tr. IV, 2943).

"There must have been **something** before that remark was made" (Tr. IV, 2944).

"What was the conversation about, **walking around barefooted?**" (Tr. IV, 2945).

"If he told you at that time, that would be one conversation. If he told you at another time, there would be two conversations, wouldn't there" (Tr. IV, 2951)?

"I do not care what you presume" (Tr. IV, 2952).

"What is the use of saying that now? You just said the man came over and said Gilley was over again and talked to the two of them, didn't you? What do you say you do not know **where** or **when** or **what** for" (Tr. IV, 2953)?

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 262.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

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STATEMENT.

The Brief for the Board in opposition monotonously repeats the same factual misstatements as were made by the Trial Examiner in his Intermediate Report and repeated in the Board's decision and in its brief below. We have, before the Board and in the Court below, systematically and painstakingly pointed out the errors contained in these statements, but still the Board persists

in their repetition. We have shown that the material findings of the Board are not supported by substantial evidence, and that the inferences drawn by the Board have no basis in fact; and we have shown that many of the findings are inexcusably careless, and that some of them are even intentionally erroneous.

The Court below impliedly concedes that we demonstrated the insufficiency of the evidence to support the separate findings of the Board by focusing attention "separately upon each of the incidents" (Tr. VIII, 9), but the Court said that this demonstration was immaterial, because of the broad power of the Board to draw inferences from the accreted force of such incidents in their setting of totality. The Board has not met our challenge of the correctness of this holding merely by repeating the statements which the Court below impliedly concedes are not supported by the evidence when attention is focused upon them separately.

It appears, therefore, to be unnecessary for us to demonstrate again that the Board's statements are not supported by the evidence when attention is focused upon them separately and, indeed, the length of the record in this case makes it impossible to do so in this Reply Brief, which must be concise. The examples set forth in our original brief in support of the Petition for Certiorari are, we believe, sufficient proof for present purposes of the unreliability of the Board's statements.

ARGUMENT.

A. The Rule Against Solicitation.

The Brief for the Board in opposition argues, as the Court below held, that the validity of the Petitioner's rule against solicitation is not a question which is open to the Court, but that the courts are bound by the Board's holding on this matter. The Board contends that in **Republic Aviation Corp. v. National Labor Relations Board and National Labor Relations Board v. Le Tourneau Co. of Georgia**, 324 U. S. 793, this Court, by "explicit statement", renounced the power of the Court over this question of law, and delegated it exclusively to the Board.

The Board has ignored the fact that by the express language of the Act the Court's power "to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board" is limited only by the language "The findings of the Board as to **facts**, if supported by evidence, shall be conclusive" (29 USC, Sec. 160 [e]). In other words, only the Board's fact-finding power is conclusive.

The Board relies upon the following language of the Republic Aviation case:

> "The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus, a 'rigid scheme of remedies' is avoided and administrative flexibility within

> appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation" (l. c. 798).

This language may support the Board's authority to issue an order directing an employer to rescind or modify a rule, but it certainly does not say or imply that the Board's decision on the question of reasonableness is conclusive and exempt from judicial review. In this case the facts upon which the question of reasonableness depends are undisputed, and the Board does not base its contention for the conclusiveness of its decision upon any question of conflicting testimony, but purely upon its asserted power to decide finally the question of law, exempt from judicial review.

The reasonableness of Petitioner's rule is necessarily a question of law. What else could it be? There is no dispute about the facts and, as this Court said in the case of **Nelson v. Montgomery Ward Co.**, 312 U. S. 373, 376:

> "The effect of admitted facts is a question of law. Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281, 61 L. ed. 722, 37 S. Ct. 287; Sanford v. Commissioner of Internal Revenue, 308 U. S. 39, 51, 84 L. ed. 20, 26, 60 S. Ct. 51."

In the case of **Midland Steel Products Co. v. National Labor Relations Board** (CCA 6), 113 F. 2d 800, 805, the Court said:

> "Whether this rule was reasonable is a question of law for the court to determine. Little Rock & M. Rd. Co. v. Barry, 8 Cir., 84 F. 944, 43 L. R. A. 349; Missouri, K. & T. Ry. Co. v. Collier, 8 Cir., 157 F. 347; Chicago, R. I. & P. Ry. Co. v. Ship, 8 Cir., 174 F. 353; Central Rd. Co. of New Jersey v. Young, 3 Cir., 200 F. 359, L. R. A. 1916E, 927."

But the brief for the Board in opposition says:

> "* * * certiorari was expressly granted in the Republic Aviation case because it was in conflict with the Midland Steel case, among others (see 324 U. S. at p. 796, fn. 2) and that in affirming the Republic Aviation decision, this Court necessarily disapproved the Midland Steel decision."

We do not understand that the action of this Court in affirming a decision necessarily has the effect of disapproving everything held in the cases mentioned as being in apparent conflict for the purpose of granting a writ of certiorari, in the absence of language in the Court's opinion which is contrary to the decision claimed to have been disapproved. Doubtless the decision of this Court in the Republic Aviation case does limit the effect of the Midland Steel case to the extent that it approves the Board's presumption with respect to a rule against solicitation, but certainly it does not disapprove the holding in the Midland Steel case that a question of reasonableness is a question of law, and that the Board's decision on such question is subject to review by the courts. In the Republic Aviation case this Court held:

> "The Board has fairly, we think, explicated in these cases the theory which moved it to its conclusions in these cases. The excerpts from its opinions just quoted show this. The reasons why it has decided as it has are sufficiently set forth. We cannot agree, as Republic urges, that in these present cases reviewing courts are left to 'sheer acceptance' of the Board's conclusions or that its formulation of policy is 'cryptic'. See Eastern-Central Motor Carriers Asso. v. United States, 311 U. S. 194, 209, 88 L. ed. 668, 678, 64 S. Ct. 499.
>
> "Not only has the Board in these cases sufficiently expressed the theory upon which it concludes that rules against solicitation or prohibitions against the

wearing of insignia must fall as interferences with union organization, but, in so far as rules against solicitation are concerned, it had theretofore succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation. In the Peyton Packing Co. Case, 49 N. L. R. B. (F) 828, at 843, hereinbefore referred to, the presumption adopted by the Board is set forth.

* * * * * * *

"**We perceive no error in the Board's adoption of this presumption.** The Board had previously considered similar rules in industrial establishments and the definitive form which the Peyton Packing Co. decision gave to the presumption was the product of the Board's appraisal of normal conditions about **industrial establishments.** Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred." (l. c. 803, 804.)

As we understand that language, this Court has held that the Board is justified in establishing its presumptions and requirements of proof with respect to rules against solicitation, and that in the absence of evidence the presumption will prevail. That presumption, however, has nothing to do with this case. In this case the Board itself has found that special circumstances exist which render it proper to put limitations on the use of the employees' own time. **This case involves a retail store, not an industrial plant**, and the Board has recognized the difference and has held that its presumption is inapplicable. Under such circumstances the decision in the Republic Aviation case is not in point. And it certainly does not mean (as the Court below assumed) that the Court does not have the **power** to review the Board's decision as to the reasonableness of a rule.

The question presented to the Court below was whether or not the Petitioner's rule is reasonable. Clearly that is a question of law which should have been considered by the Court below, but the Court refused to review and decide the question under the mistaken belief that the Board's decision was binding upon it (Tr. VIII, 6). If this decision is permitted to stand, it means that the Courts have renounced the right of judicial review on questions of law decided by the Board. This is clearly contrary to the express language of the Act, which provides only that the Board's decisions on questions of fact, if supported by evidence, are conclusive.

This case presents an important question of wide public interest, which should be decided by this Court, as to the reasonableness and validity of the rule against solicitation in a retail department store, and as to the power and jurisdiction of the Board to substitute an arbitrary and unworkable rule for the rule which has been traditionally adopted and enforced in all retail department stores, and recognized by labor unions in contracts. It is clear that the Act does not make the Board's decision on this question binding upon the Courts, and that the holding of the Court below to that effect is erroneous and sets a dangerous precedent; and that the need for certiorari is evident. The brief in opposition wholly fails to meet our contention, but on the contrary, it merely reasserts the Board's claim that its decision is as conclusive on this question of law as on a question of fact.

B. Limitations on Inference-Drawing and Fact-Finding Power of the Board.

The Board, in its brief in opposition to the petition for certiorari, has restated the questions presented by the petition, and has thereby completely altered the theory of the questions presented. As stated in the petition for certiorari, the second question presented is:

> "Whether or not the power of the Board to draw inferences permits the Board, and requires the reviewing court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence."

The Board, by its restatement, leaves only the question of whether or not the Board's findings of fact are supported by substantial evidence. Thus, the Board's restatement of the question and its argument based upon that restatement, completely avoid the question as presented by the petition, and ignore the fact that the Court below impliedly concedes that we demonstrated the lack of substantial evidence to support the Board's material findings when attention is focused upon them separately (VIII, 9).

The decision of the Court below rests upon its holding that the Board's power to draw inferences replaces the statutory requirement that the Board's findings of facts must be supported by substantial evidence. The only basis for its conclusion that it "must hold that there is sufficient evidence to support each of the Board's material findings" is that it says, in effect, that such a holding is mandatory in view of "the broad scope of inference open to the Board", and "the accreted force which conduct may acquire in its setting of totality", the absence of which may not be demonstrated by focusing separately upon each of the incidents which are said to comprise the "setting of totality" (Tr. VIII, 8, 9). Thus, the Court below holds in effect that the Board's power to draw fact-inferences is practically unlimited, and that if the Board's ultimate findings are supported by the Board's fact inferences, the requirement that the Board's findings must be supported by substantial evidence has been satisfied, and it is then not within the power of the reviewing court "to focus separately upon each of the incidents" or otherwise to determine whether or not the fact inferences are based

upon substantial evidence. It is this holding of the Court below which constitutes a misapplication of the doctrine enunciated in the **Consolidated Edison, Columbia Enameling, and Nevada Consolidated Copper** cases* and which presents a conflict with the decisions of other Circuit Courts of Appeals in the cases cited in the petition for certiorari and the Petitioner's supporting brief.

The emphasis which the Court below places upon "the accreted force which conduct may acquire in its setting of totality" **assumes** that Petitioner engaged in the conduct which the Board, by exercising its broad inference-drawing power, attributed to Petitioner. The holding of the Court below would be sound only if there were substantial evidence that Petitioner **had engaged** in the conduct mentioned in the Board's findings, leaving open only the question as to whether or not that conduct amounted to a violation of the Act. There is, however, no room for the application of the "accreted force" theory until it has first been determined from substantial evidence that the conduct, which creates the "accreted force", has actually been engaged in. It is quite clear that the Court below did not consider the record from this point of view, since it stresses "the broad scope of inference open to the Board" and brushes aside Petitioner's showing that there is no substantial evidence that the conduct was engaged in, by the terse comment that to focus separately upon each of the incidents overlooks the accreted force of the conduct. If the course of conduct which the Board attributes to Petitioner has not been followed, there can be no "accreted force" to support the Board's findings; and Petitioner was entitled "to focus separately upon each of the incidents" alleged by the Board as constituting violations of the Act in order to show that the alleged conduct

* Consolidated Edison Co. of New York, Inc. v. National Labor Relations Board, 305 U. S. 197; National Labor Relations Board v. Columbia Enameling and Stamping Co., Inc., 306 U. S. 292; National Labor Relations Board v. Nevada Consolidated Copper Corporation, 316 U. S. 105.

was not engaged in. The question presented by the petition is whether or not the Board and the reviewing court may thus disregard the substantial evidence requirement of the Act merely by relying upon the inference-drawing power of the Board. It is respectfully submitted that the Board's power to draw inferences is but the complement of its power to find facts. It is not a substitute for substantial evidence.

As authority for the holding of the Court below, the Board cites the opinion of this Court in **Texas and New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks,** 281 U. S. 548, 559-560, wherein this Court said, "Motive is a persuasive interpreter of equivocal conduct, * * *" and that the most that could be said for the employer in that case was that "the evidence permits conflicting inferences, and this is not enough." The Texas and New Orleans case stands for the proposition that where the competent and credible evidence tends to prove unlawful conduct, but of itself is not necessarily inconsistent with lawful conduct, the employer's motive may be taken into consideration and may be sufficient to remove the doubt concerning the unlawfulness of the employer's conduct which would persist otherwise. That case, however, does **not,** as the Board seems to think, stand for the proposition that an employer's **motive** may be substituted for **evidence** of unlawful conduct. This Court, in the Texas and New Orleans case, held, in effect, that after the motive had been considered, and after the employer's activities had been viewed in the light of the motive, the substantial evidence permitted conflicting inferences, either one of which, as this Court held in the Nevada Consolidated Copper case, the Board was free to draw.

In the case at bar, however, there is no competent and credible evidence which tends to prove the unlawfulness of Petitioner's conduct. The Board's material findings and the reviewing court's enforcing order are not sup-

ported, except by incompetent and incredible testimony, and that testimony is viewed in the light of Petitioner's motive, which in turn is inferred by the Board from the same incompetent and incredible evidence. The case at bar, therefore, presents a situation where the evidence fails to establish equivocal conduct which may be shown to be unlawful by reason of Petitioner's alleged motive. In addition, it presents a situation where the evidence fails to permit conflicting inferences and leaves, instead, room but for one inference—that Petitioner, on this record, is not guilty of violating the Act.

The Board points out in its brief that Petitioner's original brief in support of its petition discusses only two* of the eleven alleged discriminatory discharges, and then asserts, upon the authority of Furness, Withy & Co. v. Yang-Tsze Insurance Association, 242 U. S. 430, 434, that Petitioner has failed adequately to raise the question of substantial evidence with respect to any of the unfair labor practices, except the two alleged discriminatory discharges, merely because Petitioner has not made "appropriate references to the record" with respect to the other

* The Board, in effect, confesses the insufficiency of the evidence to support its findings in the two cases (Stewart and Marchand) discussed by Petitioner, by failing even to attempt an answer. It merely refers to its Statement. There is no reference in its Statement to Stewart, except that she was one of those whose violation of Petitioner's rule was investigated by Petitioner's counsel. This matter is fully discussed beginning on page 39 of Petitioner's original brief. As to Marchand, the Board's Statement says that she reported her illness to her superiors. There is evidence that she talked by telephone with some minor supervisors, but the evidence shows that she failed to report her illness to the Employment Office or the Manager of her department and failed to claim her sick benefits from the Welfare Association (as she had done on previous occasions when she was ill, Tr. III, 1736-1737). The record shows that she was not discharged but merely that her name was removed from the pay roll because of her absence and that during that three-months period 113 employees were removed from the pay roll for that reason (Tr. VI, 4395). The Board attempts to brush off the fact that Marchand was told, through her husband, on October 27th "to come in just as soon as she is able to come back to work" (Tr. III, 1733), by saying that this statement was made "by a clerk apparently unfamiliar with Marchand's case"; but the evidence does show that another employee, Wilkins, who was an important member of the Union's Master Committee (Tr. IV, 2816) and who had been taken off the pay roll in the same months, similarly for unexplained absence, testified that after she recovered from her illness she went into the Employment Office and explained the facts and was restored to her position with full seniority (Tr. IV, 2822).

nine. As we pointed out in our original brief, the Board's findings of fact are so shot through with error that the limitation of permissible space in a petition for writ of certiorari and a supporting brief precludes an analysis of all the evidence and an evaluation of each of the Board's findings in the light of that evidence. It was for that reason that only two of the alleged discriminatory discharges were discussed, and the analysis of one witness' testimony was attached as an appendix to the brief. The limitation of our discussion to these particular findings may not be looked upon as a mark of inability to demonstrate a similar failure on the part of the Board to support its other findings by substantial evidence. A review of this case on its merits will reveal that what we have shown with respect to the particular findings discussed may likewise be shown as to the other findings of the Board. Since we have demonstrated the unreliability of the findings, there can be no confidence in those which, for lack of space, could not be discussed in detail.

The opinion of Mr. Justice McReynolds in the Furness, Withy case was provoked by the presentation of a petition for certiorari withholding from this Court information which, had it been known to the Court, would have resulted in a denial rather than the granting of the petition. In his opinion, Mr. Justice McReynolds pointed out that the burden of this Court in disposing of petitions for certiorari is tremendous, and can be promptly discharged only if the petitions "are carefully prepared, contain appropriate references to the record and present with studied accuracy, brevity and clearness whatever is essential to ready and accurate understanding" of points requiring the Court's attention. The limitation of the discussion in our original brief was for the sole purpose of meeting the requirements of brevity and clearness, as outlined in the cited case.

If, as the Board states, the adequacy of the evidence with respect to the two alleged discriminatory discharges

discussed in our original brief presents no question of general importance, the manner in which the Board arrived at its conclusion that the discharges were discriminatory, the manner in which the reviewing court enforced the Board's order, and the substitution of the Board's inference-drawing power for the statutory requirement of substantial evidence by the Board and the reviewing court, do present a question of great general importance. It is that question which is presented by the petition.

CONCLUSION.

Petitioner respectfully submits that the brief for the Board in opposition fails completely to meet the challenge of the petition for a writ of certiorari and our brief in support thereof. The brief in opposition has merely repeated the prejudicial statements heretofore made by the Board and which are not supported by substantial evidence in the record. No attempt has been made to answer the questions raised by the petition, and we think that the Board's failure amounts to a confession of its inability to meet the questions raised.

It is respectfully submitted that this case should be reviewed by this Court as to the validity of a rule against solicitation in a retail department store, and as to whether or not the power of the Board to draw inferences permits the Board, and requires the reviewing court, to dispense with the statutory requirement that the Board's findings of fact must be supported by substantial evidence. Petitioner respectfully renews its prayer that a writ of certiorari issue, as set forth in the petition.

Respectfully submitted,

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ROBERT T. BURCH,
Attorneys for Petitioner.

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CITATIONS

703879—46——1

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OCTOBER TERM, 1946

No. 262

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (VIII, 2–18) [1] is reported at 154 F. 2d 533. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 149–171, 294–

[1] The printed record for purposes of the petition for certiorari consists of a volume entitled "Record", containing the complaint, decision of the Board, and other papers, which is referred to herein by the designation (R. —), and eight volumes numbered I through VIII, containing the transcript of testimony, exhibits, and record of proceedings in the court below, which are referred to herein by the roman numeral designating the appropriate volume, thus (I, —).

295)[2] are reported in 59 N. L. R. B. 976 and 61 N. L. R. B. 3.

JURISDICTION

The decree of the court below (VIII, 45–49) was entered on May 23, 1946. A petition for rehearing (VIII, 19–44), filed by the petitioner herein, was denied on May 20, 1946 (VIII, 45). The petition for a writ of certiorari was filed on July 2, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board properly found that the no-solicitation rule promulgated and enforced by petitioner in its department store constituted an unwarranted restriction on the organizational rights of its employees insofar as it prohibited them from soliciting membership for unions during their non-working time off the selling floors of petitioner's store.

2. Whether there is substantial evidence to support the findings of the Board that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act,

[2] The Board's Decision and Order adopted, with some modifications, the Intermediate Report of the Trial Examiner, which is found at R. 171–292 (R. 149).

and discriminated in regard to the hire and tenure of employment of eleven of its employees in violation of Section 8 (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 21–23.

STATEMENT

Upon the usual proceedings, the Board, on December 14, 1944, issued its findings of fact, conclusions of law, and order (R. 149–292).[3] The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[4]

In the spring of 1937, United Retail, Wholesale and Department Store Employees Union of America, affiliated with the Congress of Industrial Organizations, which filed the charges in this proceeding (hereinafter called the Union), and an affiliate of the American Federation of Labor initiated competing organizational campaigns among petitioner's employees (R. 176; I, 59–65). Petitioner thereupon distributed leaflets among its employees during business hours which plainly expressed petitioner's animosity toward the Union and its campaign (R. 176–177; I, 63–68, VII, 4771–

[3] On March 26, 1945, the Order was amended by the Board in a minor particular not relevant here (R. 294–295).

[4] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

4773). In August 1937, petitioner compelled employee Buddie to resign from the Union, utilizing a form of letter prepared by petitioner, as a condition of remaining in petitioner's employ (R. 178–180; IV, 2687–2694). Similarly, in October 1937, employees McCaffery and Bolfing were compelled by Superintendent of Employment McCarthy to sign prepared letters of resignation from the Union (R. 180–182; V, 3266–3274, 3279–3282).[5]

In August 1941, the Union renewed its organizational campaign, which had been abandoned in the latter part of 1937 (R. 185; V, 3305–3308). In September 1941, petitioner engaged a labor spy, McClelland, through a detective agency (R. 150, 185–186; I, 292–306, 401–402). McClelland was "planted" as an ordinary employee, and made daily written reports to petitioner through the detective agency concerning the Union sentiments and activities of his "fellow employees" (R. 150, 186–188; I, 304–347, 400–401, II, 1096–1097, 1153). On December 3, 1941, McClelland attended a meeting of the Union and reported the names of two employees who were present (R. 190; I, 399–400, V, 3353–3354); thereafter, these two employees

[5] Because the matters set forth in the foregoing paragraph were not specifically alleged in the complaint as constituting unfair labor practices, the Board did not find them to be such, but did find that "they are indicative of the [petitioner's] attitude prior to, and cast light upon its motives in connection with the activities alleged in the amended complaint" (R. 184).

were discharged (R. 190; III, 1755, V, 3354). The same detective agency also on occasion supplied petitioner with other labor spies (R. 150, 200–204; I, 485–490, 495–496, 505–511).

In April 1942, petitioner engaged in another form of surveillance by taking motion pictures of the distribution of handbills to petitioner's employees by Union organizers (R. 150, 198–199; I, 210–212, II, 1285–1290). Petitioner's employees were aware that their acceptance of handbills was thus being documented (R. 199; II, 1288, 1624); as a result of this and other restrictions brought about by petitioner, the Union's handbill distribution fell off by about one-third (R. 199; II, 1304–1305, V, 3316). In September and October 1942, petitioner varied its technique somewhat by taking still photographs of Union literature distribution and of other Union activities (R. 150, 199–200; II, 1332–1333, 1348–1349, 1352).

On August 21, 1942, the Union achieved some success by signing up practically the entire Toy Department as a group (R. 150, 207; V, 3318–3319). The next day, many of petitioner's high officials paid unprecedented visits to the Toy Department, conferring there in low tones and staring suspiciously at the employees (R. 150, 207; III, 1698–1703, 2092–2094, IV, 2740–2742, 2756–2758, 3045–3062, 3114, 3243). This behavior, coupled with remarks made to employees by petitioner's supervisors, aroused fears among the employees that petitioner was planning economic

reprisals against them for having joined the Union (R. 150–151, 163, 207–208; III, 1701–1702, 1708–1711, IV, 2741–2742, 3114, 3244–3245).

On October 8, 1942, 32 of the 35 salespeople in the Basement Shoe Department wore union buttons for the first time (R. 153, 245; IV, 3186–3187). The assistant executive head of the department scrutinized various employees, made written notations on a slip of paper in their presence, and asked one of them what the employee expected to gain from the Union (R. 153, 245; IV, 3185–3188). Following these incidents the supervisors in this department placed unprecedented restraints upon the employees' right to converse with one another in their free time (R. 153, fn. 12, 245; IV, 2694–2697, 2701–2702, 3189–3191, VI, 4554), and other supervisors made anti-union remarks to a button-wearer (R. 153, 261–264; III, 1981–1983, 1987–1988).

In September 1942, petitioner told employee Stolte that it had been considering giving her and other cleaning women a wage increase, but that it had changed its mind, and that the employees "had the Union to thank for that" (R. 152, 204, 206–207; IV, 3128–3135, 3137, V, 3334–3337, VI, 4515, VII, 4773–4780). In February 1943, petitioner induced employee Robertson to resign from the Union by expressly making his wage increase conditional upon his taking that action (R. 152, 224; IV, 2799–2807, VII, 4823, 4825).

In October 1942, petitioner defamed the Union by imputing to it responsibility for alleged acts of vandalism which it had no reasonable basis for believing were in any way caused by the Union (R. 152, 238–244; I, 264, 268–269, 288, II, 1166, 1167, 1175–1188, V, 3345–3346, VI, 4330, 4577, 4585–4589, 4591). From March to October 1942, petitioner repeatedly made statements to its employees, both individually and as a body, that it was unnecessary for them to join a union in order to hold a job with petitioner, without coupling with this statement any assurance that they could retain their jobs if they did join a union (R. 151; I, 102–106, 111–113, 117–118, 199–200, VII, 4787–4789). In October petitioner also informed its employees in substance that it would be futile for them to seek through collective bargaining any increases in wages or other changes in vital working conditions (R. 151–152, 232–237; I, 94–96, 259–262, V, 3434–3436, 3438–3439, VI, 4664–4665, Bd. Exhs. 16, 26, 51, 201, 234, 235). About the same time petitioner questioned an employee concerning her union affiliations and told her it would be useless to join the Union because "wages are frozen" (R. 152, fn. 8, 153, 244, fn. 111; IV, 2786–2789).

The Board found that petitioner's use of labor spies, its surveillance of Union activities through motion pictures and still photographs, its conditioning of a wage increase upon resignation from

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the Union, and the other acts and statements summarized above "were integral parts of a course of conduct which was designed to defeat the Union's organizational efforts and which interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," in violation of Section 8 (1) of the Act (R. 150).

In the fall of 1941, shortly after the Union renewed its organizational efforts among petitioner's employees, petitioner began to "reemphasize" a rule prohibiting employees from soliciting membership for any organization on company premises, whether on working or nonworking time (R. 149, 277–278; I, 257–258). It made repeated announcements of the rule in various ways coupled with the warning that violators of the rule had been and would be discharged (R. 149, 188–190, 204–205, 209, 216, 222–224, 231–232, 277–278; I, 105–106, 113–115, 117–119, 140–142, 145–147, V, 3432–3434, Bd. Exhs. 17, 21, 25, 28, 29).

The Trial Examiner found the no-solicitation rule to be wholly invalid insofar as it applied to non-working time (R. 280–282). The Board, reversing the Trial Examiner in part, held as follows (R. 154–155):

> We have in many prior decisions made clear our position that working time is for work, and that the Act does not prevent an employer from promulgating and en-

forcing reasonable rules governing the conduct of employees during working hours. We have made it equally clear, however, that, in the absence of special circumstances, a prohibition against union solicitation on the employer's premises outside of working time, such as "before and after work and during the luncheon and rest periods," does not bear reasonable relation to the efficient operation of the employer's business, and therefore constitutes an unwarranted interference with the employees' rights under the Act. The [petitioner] urges that, while the foregoing principles may be sound as applied to industrial plants, they should not be invoked in cases involving retail department stores because of the unique manner in which the latter type of enterprise conducts its operations. We perceive no reasonable basis for distinguishing between the two types of enterprises so far as concerns a general prohibition against union solicitation by employees during nonworking hours at all places on the [petitioner's] premises. The [petitioner] has adduced no convincing evidence that such a blanket injunction bears reasonable relation to the efficient operation of its business. However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the solicitation, if carried on on the selling floor, where customers are

> normally present, might conceivably be disruptive of the [petitioner's] business. We therefore find that the [petitioner's] rule is invalid, and violative of the Act, only insofar as it prohibits union solicitation off the selling floor during nonworking hours (such as luncheon and rest periods).*

The Board found that apart from the unlawful scope of the no-solicitation rule, petitioner enforced it discriminatorily against adherents of the Union (R. 153–154). Thus, while imposing the penalty of discharge on adherents of the Union for violations or claimed violations thereof (*infra,* pp. 11–12), petitioner permitted an employee who was a paid organizer for the rival (A. F. of L.) union openly to solicit membership for that organization on company time and property (R. 153–154, 278; IV, 2929–2936). Even when the attention of petitioner was specifically called to this open solicitation on behalf of the A. F. of L., petitioner took no action to discipline the employee or stop her activities (R. 154, 278; I, 99–100, 110–111, IV, 2959–2960, 2965, 2967, 2968, VI, 4329, VII, 4829).

The Board found that petitioner's disparate treatment of the Union and the A. F. of L. in enforcing the no-solicitation rule constituted discrimination against the Union in further violation of Section 8 (1) of the Act (R. 153–154).

* The Board's footnotes have been omitted from the foregoing quotation.

Between September 18 and November 6, 1942, petitioner discharged or laid off seven employees who belonged to the Union, allegedly for violating the no-solicitation rule. The Board found that since, as above indicated, the rule was discriminatorily enforced against adherents of the Union, it followed as a matter of law that the discharges and lay-offs were discriminatory and violative of Section 8 (3) of the Act (R. 156). Apart from this distinct and sufficient basis for its conclusion, the Board also found that of these employees, two (Brown and Moore) had not actually violated the rule as petitioner itself interpreted it (R. 157–158; I, 684–685, 689–692, 802–805, 881–887, 891, II, 938–945, 954, 966–968, 972, III, 2067–2073, 2077–2079, 2082–2085, 2089–2091, 2098–2099, 2103–2107, VI, 4211, 4213–4214, 4217, 4699–4703, VII, 4860); with respect to two others (Schneider and Athanas) petitioner had previous to their discharge plainly exhibited its hostility towards them because of their membership in the Union (R. 158–159, 190–192, 209–214, 261–266; III, 1977–1983, 1986–1988, 1993–1994, 1999); with respect to the remaining three employees, all were known to petitioner to have been active on behalf of the Union (R. 156–157; I, 833, III, 1749–1753, 1764–1765, 1850–1853, 1869–1883, 1885–1886, 1892–1894, 1936–1938, 1939–1941, 1951–1952, IV, 2662–2663); as to all seven employees, petitioner's decision to discharge or lay off the employee was made on the

basis of a third person's version of what had occurred, and petitioner, contrary to its professed practice, made no effort to obtain the accused employee's version before making the decision to discharge or suspend him (R. 157; record references *supra* as to *Brown, Moore,* and *Schneider,* and as to *Athanas* see I, 794–798, III, 1772–1773, *Rosciglione,* II, 895–903, III, 1945–1946, *Taff,* II, 919, 921–927, IV, 2667–2669, *Stewart,* I, 811–812, 814–817, 823–827, 833–836, III, 1846–1850, 1862–1864).

Employees Case and Jennewein were employed by petitioner for a substantial period prior to October 10, 1942, as "regular selling extras," each receiving about four days' work per week during that period (R. 159; II, 993–997, III, 2192–2194, IV, 2618–2621). After October 10, when both wore union buttons to work for the first time (R. 159; III, 2194–2198, IV, 2621–2623, 2625–2628), neither was given any work by petitioner (R. 159; III, 2198, IV, 2629–2631). The Board considered and rejected various conflicting explanations put forward by petitioner for its refusal to give these two employees further employment (R. 159–160; II, 991–993, 1012–1013, 1016–1017, 1018–1019, III, 2200–2202, IV, 2631). The Board concluded on the basis of the circumstances shown by the record that Case and Jennewein were refused employment after October 10 because of their membership in and open support of the Union (R. 159–160; II, 1000–1003, Bd. Exhs. 123, 124, 125,

II, 1015–1016, III, 2199–2200, 2200–2202, IV, 2624–2625, 2631, 2632–2635).

King was employed in petitioner's store as a demonstrator for various concerns promoting the sale of their products in the store (R. 250–251; IV, 2538–2540, Bd. Exh. 184). On October 5, 1942, she joined the Union and the next day wore a union button at work (R. 161, 251; IV, 2558–2559). A supervisor observed the button and commented on it to King (R. 161, 251; IV, 2559); four days later King received a dismissal notice from the concern whose scarves she was demonstrating (R. 161, 251; IV, 2559–2560). The same day, King was offered a position as demonstrator in petitioner's store by a turban concern, which offer was immediately withdrawn after petitioner interposed objections to King's employment (R. 161, 251; II, 1024, IV, 2545, 2561–2564). Subsequently King applied for and was refused employment by petitioner as a saleslady (R. 161, 252–253; IV, 2574–2575). The Board concluded on the basis of this and other cogent evidence (R. 161, 251–253) that petitioner discriminatorily caused the scarf concern to discharge King, discriminatorily induced the turban concern to deny her work, and itself discriminatorily refused to employ King as a saleslady (R. 160–161; II, 999–1003, IV, 2540–2542, 2564, 2572, 2603–2604, VI, 4639–4644). The Board also found that petitioner was an employer of King within the meaning of Section 2 (2) of the Act while she was

serving in its store as a demonstrator (R. 162–163; II, 1022–1031, 1034–1038, IV, 2550, 2572–2573, 2576–2578, 2579–2580).

Employee Marchand had been continuously employed by petitioner for 15 years and concededly was an excellent employee until her discharge on October 24, 1942 (R. 163, 164, 267; II, 932, III, 1695–1697, 1731–1732). She joined the Union, and became its secretary on October 7, 1942, a fact which petitioner admittedly learned (R. 163, 270; II, 932, III, 1698–1699, 1722). Petitioner's supervisors communicated to her their displeasure at her Union affiliation (R. 163, 268–269; III, 1708–1714). Beginning October 9, 1942, Marchand was absent from work due to illness, which she duly reported to her superiors on several occasions (R. 163, 164, 270; III, 1726–1731). On October 24, petitioner discharged her, falsely assigning as the reason that she had been absent "since Oct. 8, and has not reported" (R. 163, 267; III, 1731–1732). Marchand had been absent from work for a longer period before joining the Union without disciplinary action (R. 164, 271; III, 1734–1737); at the time she was discharged petitioner was suffering from an acute shortage of labor (R. 164; II, 932, 999–1000). The Board concluded from all the circumstances that petitioner's discharge of Marchand was discriminatory (R. 164; III, 1732–1737, 1737–1738, VII, 4801–4802).[7]

[7] The Board awarded back pay to Marchand only for the period November 12 to 17, 1942, finding that Marchand should

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 149–164, 289–290). Its order directed petitioner to cease and desist from its unfair labor practices; to offer reinstatement with back pay to the eleven employees discriminatorily discharged or laid off; to rescind immediately its rule against solicitation insofar as it prohibits union solicitation off the selling floor during non-working hours; and to post appropriate notices (R. 167–171).

On May 19, 1945, the Board filed in the court below a petition for enforcement of its order (R. 295–300). On April 11, 1946, the court handed down its opinion (VIII, 2–18), enforcing the Board's order with a minor, clarifying modification (VIII, 18). On April 26, 1946, petitioner filed a petition for rehearing (VIII, 19–44), which the court denied on May 20, 1946 (VIII, 45). On May 23, 1946, the court below entered its decree enforcing the Board's order with the minor modification mentioned (VIII, 45–49).

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have reported to petitioner on November 17 in accordance with a letter petitioner sent her on November 14 (VII, 4802) offering to discuss her reemployment. It should be noted that an earlier statement of October 27 upon which petitioner places much reliance as refuting discrimination (Pet. 52–53) was made by a clerk apparently unfamiliar with Marchand's case and who did no more than suggest that Marchand come in to the office to discuss the matter (III, 1732–1733). Marchand's employment had then already been terminated by petitioner; indeed, even petitioner's final letter of November 14 speaks of Marchand's application for "reemployment" (VII, 4802).

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ARGUMENT

1. Petitioner's attack (Pet. 4–6, 10, 11, 13–25) upon the Board's determination that petitioner's no-solicitation rule was in part invalid is foreclosed by the controlling decisions of this Court in *Republic Aviation Corp.* v. *National Labor Relations Board,* and *National Labor Relations Board* v. *Le Tourneau Company of Georgia,* 324 U. S. 793. Petitioner's rule proscribed solicitation for a labor organization on the employees' own time anywhere in petitioner's establishment. The Board, confronted with the necessity of "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments" (the *Republic Aviation* and *Le Tourneau* cases, *supra,* at pp. 797–798), concluded that the rule was valid insofar as it forbade solicitation at all times on the selling floor, but was invalid insofar as it prohibited solicitation on non-working time off the selling floor (R. 155).

The *Republic Aviation* and *Le Tourneau* cases fully sustain the Board's action in the instant case. Here, as in those cases, the Board cited and relied upon the principles enunciated by it in *Matter of Peyton Packing Co.,* 49 N. L. R. B. 828, 843, and approved as proper by this Court (the *Republic Aviation* and *Le Tourneau* cases, *supra,* at pp. 803–804). In accordance with the

Peyton Packing case, the Board examined petitioner's contention that the operation of a department store presented "special circumstances" and sustained petitioner's contention to the extent that it found "special circumstances" to exist, i. e., it held petitioner's rule to be proper on the selling floor at all times because customers normally are present there and solicitation "might conceivably be disruptive of the [petitioner's] business" (R. 155). But as to places off the selling floor where customers are not normally present, the Board held the rule to be invalid with respect to non-working time since it perceived "no reasonable basis for distinguishing between" a department store and other plants in which employees desire to join unions and bargain collectively and use their free time to solicit other employees to join them (R. 155). The Board's determination was plainly reasonable, not arbitrary, and hence was properly sustained by the court below (VIII, 4–8).

Petitioner's repeated contention (Pet. 11, 13, 16, 19, 21, 22–24) that the validity of its no-solicitation rule is a matter of law to be decided by the court rather than by the Board is in the teeth of this Court's explicit statement in the *Republic Aviation* and *Le Tourneau* cases that the Act "left to the Board" the task of applying the Act's general prohibitions "in the light of the infinite combinations of events which might be charged as violative of its terms" (324 U. S.,

at p. 798). Similarly petitioner's claim of conflict (Pet. 6, 22, 24) with *Midland Steel Products Co.* v. *National Labor Relations Board,* 113 F. 2d 800, 805 (C. C. A. 6), disregards the conclusive fact that certiorari was expressly granted in the *Republic Aviation* case because it was in conflict with the *Midland Steel* case, among others (see 324 U. S. at p. 796, fn. 2), and that in affirming the *Republic Aviation* decision, this Court necessarily disapproved the *Midland Steel* decision.

2. Petitioner repeatedly charges (Pet. 5, 6–8, 10–12, 25–84) that the Board's findings are unsupported by substantial evidence. Curiously enough, however, in its petition and supporting brief aggregating some 84 pages, petitioner manages to discuss only two of the eleven discharges or layoffs found by the Board to be discriminatory and omits all discussion of the Board's numerous section 8 (1) findings [8] based upon petitioner's manifold and extreme violations of the Act. Thus petitioner makes no effort to demonstrate that substantial evidence is lacking to support the Board's findings that petitioner employed labor spies, engaged in surveillance of Union activities through motion pictures and still photographs, conditioned a wage increase upon resignation from the Union, and otherwise attacked the Union in the many ways summarized in the Statement (*supra,* pp: 3–8). Likewise, with respect to nine of the

[8] Other than the no-solicitation rule findings, *supra,* pp. 8–10, 15–17.

discharges or lay-offs, petitioner's bare allegations of error are not accompanied by "appropriate references to the record" (*Forness, Withy and Co.* v. *Yang-Tsze Insurance Association,* 242 U. S. 430, 434). Hence the question of substantial evidence is not adequately raised with respect to the foregoing unfair labor practices.

With respect to the two discharges (Stewart and Marchand) which petitioner discusses in elaborate detail as "examples" (Pet. 33–51, 51–54), the evidence summarized in the Statement (*supra,* pp. 11–12, 14–15) affords full support for the challenged findings. Especially is this so when as the court below indicates, the questions of "motive and discrimination" are viewed in the light of petitioner's "desire to thwart or nullify unionizing efforts" (VIII, 9). As this Court has pointed out (*Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 559–560):

> Motive is a persuasive interpreter of equivocal conduct, and the [petitioner is] not entitled to complain because [its] activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the [petitioner] on the questions of fact is that the evidence permits conflicting inferences, and this is not enough.

In any event, the adequacy of the evidence with respect to Stewart and Marchand presents no question of general importance. The cases cited by petitioner in which the circuit courts of ap-

peals have held Board orders not supported by substantial evidence turned, of course, on their facts and do not show a conflict.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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JULY 1946.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment mem-

bership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the

court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1946